United States Court of Appeals

for the Second Circuit

APPENDIX

75-6013

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6013, 75-6053

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

LEONE BOSURGI AND EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI AND EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONS COMERCIALES E INDUSTRIALES, AND BENEDICT GINSBERG,
Defendants-Appellees,

—*and*—

ESTATE OF ADRIANA BOSURGI, DECEASED, AND W. SANDERSON & SONS,
Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader of of Chemical Bank,

—*and*—

CHEMICAL BANK,
Third-Party Plaintiff,

—*against*—

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONS COMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONS COMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONS COMERCIALES E INDUSTRIALES, AND W. SANDERSON & SONS,
Third-Party Defendants.

UNITED STATES COURT OF APPEALS
FILED
JUN 30 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR PLAINTIFF APPELLANT

PAUL J. CURRAN
United States Attorney
for the Southern District of New York
Attorney for United States of America,
Plaintiff-Appellant

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CIVIL DOCKET

NITED STATES DISTRICT COURT

A 171 CIVIL 2?8

Jury demand cancelled 3/26/71 by deft. Chemical Bank.

TITLE OF CASE

TED STATES OF AMERICA

AGAINST.

N BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE E
ATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL
K AS STATUTORY EXECUTOR OF THE ESTATE OF
IANA BOSURGI, DECEASED, AND Partial Release
N BOSURGI AND EMILO BOSURGI 2nd 6/1/72

17/71 ESTATE of Adriana Bosurgi, deceased & Addtl. Defts. to counterclaim and Cross-Claim for Interpleader.
BENEDICT GINSBERG.

ATTORNEYS

For plaintiff:
WHITNEY NORTH SEYMOUR JR.
U.S. ATTORNEY
Foley Square,
N.Y.C.N.Y. 10007

For defendant:
Cravath, Swaine & Moore (for Chemical Bank)
One Chase Manhattan Plaza, NY 10005 HA 2-30
Benedict Ginsberg (for Leone and Emilio Bosurgi) 475 Fifth Ave. NY 10017 MU 3-707
Gainsburg, Gottlieb, Levitan & Cole (for Sociedad Anonima de Inversiones Comm.,
122 East 42nd St. NY 10017

STATISTICAL RECORD

S. 5 mailed X

S. 6 mailed ✓

Basis of Action:
FORECLOSURE TAX LIEN
$656,780.72

Action arose at:

COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
Clerk		U.S.A.		
Marshal				
Docket fee				
Witness fees				
Depositions				

A

JUDGE [illegible] 71 CIV. 925 Pa

JUDGE STEWART A 2

DATE	PROCEEDINGS	Date Order Judgment N
Mar2-71	Filed Complaint. Issued Summons.	
ar 3,71	Filed pltffs' Order to Show Cause. Re: Prel. Inj. Ret. 3-9-71	
ar 8,71	Filed defts Bosurgi, affidavit in opposition to an applicat on by pltff for prel inj. Ret. 3-9-71	
ar.9-71	Filed (in court) Affidavit in opposition.	
ar.10-71	Filed MEMO.END. on motion papers filed 3/3/71. Motion denied following argument. SETTLE ORDER ON NOTICE in accordance with the Court's ruling. Bonsal,J.	
Mar.17-71	Filed ANSWER of Chemical Bank to complaint, counterclaim and cross-claims of deft. Chemical Bank.	CS&M
Mar.17-71	Filed third party complaint and issued 3rd pty. summons.	
ar.18-71	Filed Supplemental Affidavit in support of counter order.(of Benedict Ginsberg)	
ar.18-71	Filed Supplemental Affidavit of Howard G. Kristol.	
Mar 18,71	Filed Order that the motion of U.S.A. for a preliminary injunction is denied, subject to the following as indicated. Bonsal J. -mailed notice.	
ar.24-71	Filed Demand for Jury Trial by deft. Chemical Bank.	
ar 23,71	Filed Order that John A. Lucido, and Howard G. Kristol are appointed to serve the 3rd pty summons and 3rd pty complaint upon 3rd pty defts. Clark.	
ar 24,71	Filed affidavit of Howard G. Kristol of service of summons upon Benedict Ginsberg.	
ar.26-71	Filed third party summons - no service indicated.	
ar.24-71	Filed Notice of Appeal by defendant Chemical Bank.(mailed copy)	
ar.31-71	Filed transcript of Record of Proceedings of March 23, 1971.	
r.2-71	Filed stipulation and order extending deft. Chemical Bank's time to amend its answer, counterclaim and cross-claims dated 3/12/71 (filed 3/17/71) to 5/11/71. So ordered. Cooper, J.	
r.5-71	Filed stipulation that the Notice of Settlement of deft. Chemical Bank dated 3/16/71 and the counter-proposed order and affidavit of Howard G. Kristol, may be filed withthe Clerk of this Court and included in the record on appeal.	
pr.6-71	Filed Certified Record on Appeal to the U.S.C.A.	
r.28-71	Filed Notice of Motion re: Dismiss Complaint. Ret. 5/18/71. by Bosurgi, Leon and Emilio).	BG CS&M
ay 13-71	Filed Amended ANSWER, counterclaim and cross claims of deft Chemical Bank.	
ay 13-71	Filed MANDATE Of the U.S.C.A. Ordered that the order of the District Court is affirmed. Fusaro, Clark. Judgment ent. 5/14/71. Ent. 5/14/71. (mailed notice).	
ay 17-71	Filed stipulation adjourning motion now ret. 5/18/71 to 5/25/71.	
ay 24-71	Filed Affidavit of John A. Lucido.	
ay 21-71	Filed Memorandum of 3rd pty. Pltf. Chemical Bank in opposition to the motion of the 3rd pty. defendants to vacate and set aside service of process.	
Jun 2-71	Filed Supplemental Affidavit of John A. Lucido.	
n 15-71	Filed Certificate of Mailing by registered mail, return receipt requested, summons and complaint addressed to: Leon Bosurgi Villagio Pace Via Consolare Pompea, 33, Messina, Italy Rec.#301897 recd.7/21/71 Receipt #301897 Emilio Bosurgi Villagio Pace Via Consolare Pompea, 29 Messina, Italy Receipt #301896	
un.16-71	Filed Transcrip of record of proceedings dated March 23, 1971	
v.4-71	Filed Notice of Motion re: Add Parties. Ret.11/16/71. (by Pltf.)	
v.10-71	Filed MEMO.END. on motion papers filed 11/4/71. Motion granted no opposition. SETTLE ORDER ON NOTICE. Bonsal, J.	
v.11-71	Filed ORDER. For the reasons stated we find that the litigation entitled "Leone Bosurgi,etc. was pending in the N.Y. upreme Court at the time of service of process upon the atty.for the 3rd pty. defts.herein. Accordingly, the motion to vacate and set aside that service is denied. It is so ordered. Lasker, J. (mailed notice)	

continued next page

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110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
v.29-71	Filed Notice of Settlement and Order. ~~Ordered that the plaintiff file its amended complaint; ordered that a summons and complaint be served upon the defendants heretofore named and also Sociedad Anonima de Inversiones Comerciales e Industriales and Benedict Ginsberg. Bonsal, J.(mailed notice).~~	
c.1-71	Filed Amended Complaint and issued summons.	
.17-71	Filed Amended Summons with Marshal's ret. Served. Sociedad Anonima de Inversions Commerciales Industriales, by Samuel Gottlieb, on 12-7-71 Leone Bosurgi, by Benedict Ginsberg, on 12-7-71 Benedict Ginsberg, Esq. by on 12-7-71 Emilio Bosurgi, Benedict Ginsberg, on 12-7-71 Chemical Bank, by Luciola on 12-6-71	
c 23 71	Filed Notice of Motion Re: Dismiss Complaint (by Deft Saici)and Affidav Ret. 1/11/72/	
23 71	Filed Memo. of Deft. Sociedad Anonima de Inversions Commerciales in support of motion. (by Deft.)	
.2.-71	Filed stipulation and order extending defts. Chemical Bank's time to answer amended complaint to 2/1/72. So ordered. Pierce, J.	
3/72	Filed ANSWER OF BENEDICT GINSBERG, Deft.	BG
3/72	Filed Notice of Exam. before trail.	BG
1/5/72	Filed Memo. of Law. (by Pltff)	
10/72	Filed Stip. for Deft. Sociedad Anonima de inversiones Comerciales e x industriales. adjourning Motion now ret. 1/11/72 to 1/25/72.	
n 27/72	Filed Stip. & Order extending time to answer to 3/1/72. So orderd Mac Mahon J.	
2/72	Filed Order That Robert Chandler.representative of Internal Revenue Service.etc Serve a copy of amended summons and amended complaint upon dft Leone Bosurgi & dft Emilio Bosurgi, as indicated Gagliardi J (mailed notice)	
b.23-72	Filed stipulation and order extending deft. Chemical Bank's time to answer the amended complaint to 4/15/72. So ordered. Tenney, J.	
ar 21-72	Filed ORDER THAT A COPY OF THE AMENDED SUMMONS AND AMENDED COMPLAINT BE SERVED upon deft.Leone Bosurgi and deft. Emilio Bosurgi by a person authorized under Italian Law, as indicated. Bauman, J. (mailed notice).	
.20-72	Filed stip & order that deft. Chemical Bank's time to answer the amended complaint is ext. to 4-21-72. So ordered. McLean, J.	
25-72	Filed stip & order that deft Chemical Bank's time to move or answer the amended complaint is ext. from 4-21-72 to 4-25-72 So ordered- McLean, J	
r.28-72	Filed ANSWER of Chemical Bank to amended complaint, Amended counterclaim, amended cross-claims and AMENDED THIRD PARTY COMPLAINT, and issued 3rd pty. summons.	
.28-72	Filed stipulation and order extending deft. Chemical Bank's time to answer amended complaint to 4/27/72. So ordered. McLean, J.	
y 2-72	Filed Affidavit of John A. Lucido in support of request for issuance of summons.	
19-72	Filed Certificate of Mailing complaint and summons addressed to Emilio Bosurgi, as Agent of W.Sanderson & Sons, Esmeralda 1008, Buenos Aires,Argentina - see list attached on 5/12/72. Receipts numbers 318358 through 318376 (19 services).	

20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	3	2	1	NUMBER OF MOTION	NAME AND ADDRESS OF SENDER

71Cir: 928

5/12/22 - C...

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☐ Registered ☐ Insured C.O.D.
☐ Certified

Affix stamp here if issued as certificate of mailing or for additional copies of this bill.
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NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEE	R. R. FEE	SPEC. DEL. FEE	ACTUAL VALUE	DECLARED	REM
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				Receipt # 31836			5/1
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				Receipt # 31836			Rec
				Receipt # 31836			Rec

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POSTMASTER, PER (Name of receiving employee)

Show under "Remarks" class postage paid if other than (if international)

APPLICATION FOR REGISTRATION OR CERTIFICATION

(No charges are now required on international replies)

416-16-6743-16 U.S. GOVERNMENT PRINTING OFFICE

DATE	PROCEEDINGS	Date Judgm
May 18-72	Filed Affidavit of service by mail of ~~xxxdedxxx~~ answer to amended complaint, amended counterclaim, amended cross-claims and amended third party complaint of deft. Chemical Bank upon deft. Benedict Ginsberg on 5/12/72.	
May 26-72	Filed Notice of Rejection. (relative to 3 3rd pty.summonses and amended 3rd pty.comp	
"	" " "	
"	" " "	
May 1 -72	Filed Notice of Motion re: Dismiss cross-claim. Ret. 6/13/72.(by deft. SAICI)	GGL
May 19-72	Filed Memorandum of deft-3rd pty.deft. Sociedad in support of motion.	
Jun 2-72	Filed Certificate of Mailing summons and complaint, by registered mail, return receipt requested addressed to:	
	Estate of Adriana Bosurgi c/o Leone Bosurgi Esmeralda 1008 Buenos Aires, Argentina Receipt #301,285 Ret. Rec. 7-11-72	
	Estate of Adriana Bosurgi c/o Leone Bosurgi Via Seminaro Messina, Italy Receipt #301,289 Ret. Rec. 6-12-72	
	W. Sanderson & Sons Milan, Italy Receipt #301,290 Ret. rec. 6-12-72	
	W. Sanderson & Sons L Via Durini Milan, Italy Receipt #301,287 Ret. Rec. 6-12-72	
	Estate of Adriana Bosurgi c/o Emilio Bosurgi Via Seminaro Messina, Italy Receipt #301,286 Ret. Rec. 6-12-72	
	Estate of Adriana Bosurgi c/o Emilio Bosurgi Esmeralda 1008 Buenos Aires, Argentina Receipt #301,285 Ret.Rec. 6-12-72	
Jun -72	Filed Partial Default Judgment. Ordered that the USA have judgment against the defendants Leone Bosurgi and Emilio Bosurgi for the sum of $25,000. together with interest thereon. Cannella, J. DOCKETED AS JUDGMENT #72,598. (mailed notice).	
Jun -72	Filed Certificate of Mailing by registered mail, return receipt requested, summons and complaint addressed to: W. Sanderson & Sons L Via Durini Milan, Italy Receipt #300930 - Ret Rec 7-12-72	
Jun -72	Filed OPINION #38513. The defendant Sociedad Anonima de Inversions Commerciales e Industriales motion to vacate the purported service upon it of the amended summons and complaint, is denied. Weinfeld, J.(mailed notice).	
May 19-72	Filed Notice of motion to dismiss cross-claims (by deft SAICI)	G
Jun 7-72	Filed Notice of Rejection.	
Jun.9-72	Filed affdvt. of John A. Lucido, for deft. Chemical Bank, in opposition to the motion of 3rd party deft. Sociedad Anonima, for a order dismissing cross-claim for interpleader, etc.	
Jun.12-72	Filed stip. that the motion of SAICI to dismiss the Chemical Bank's cross claim, etc. now ret. on 6-13-72 is adjourned to 6-20-72.	
Jun 21-72	Filed stipulation and order extending deft. S.A.I.C.I.'s time to answer complaint to 7/7/72. So Ordered. Cooper, J.	

continued next page

U.S.A. VS. LEONE BOSURGI, et JUDGE DUFFY 71 Civil 928

A 6

DATE	PROCEEDINGS	Date Order or Judgment Noted
22-72	Filed certificate of Mailing summons and complaint, by registered mail, return receipt requested addressed to: Receipts 315567	
	Leone Bosurgi, 315568 315568	
	Via Consolare Pompea, 33 315569 315569	
	Villagio Pace 315570 315570	
	Messina, Italy 315571 315571	
	Leone Bosurgi 315572 315572	
	as Agent of W. Sanderson & Sons 315573 315573	
	Via Consolare Pompea, 33 315574 315574	315575
	Villagio Pace 315575 and	315576
	Leone Bosurgi	
	as Agent of Sociedad Anonima de Inversions Commerciales e Industriales,	
	Via Consolare Pompea, 33	
	Villagio Pace	
	Messina, Italy	
	Leone Bosurgi,	
	as Trustee for Sociedad Anonima de Inversions Commerciales e Industriales	
	Via Consolare Pompea, 33	
	Villagio Pace	
	Messina, Italy	
	Leone Bosurgi	
	as Executor of the Estate of Adriana Bosurgi	
	Via Consolare Pompea, 33	
	Villagio Pace	
	Messina, Italy	
	Emilio Bosurgi	
	Via Consolare Pompea, 29	
	Villagio Pace	
	Messina, Italy	
	Emilio Bosurgi	
	as Agent of W. Sanderson & Sons	
	Via Consolare Pompea, 29	
	Villagio Pace	
	Messina, Italy	
	Emilio Bosurgi	
	as Agent of Sociedad Anonima de Inversions Commerciales e Industriales	
	Via Consolare Pompea, 29	
	Villagio Pace	
	Messina, Italy	
	Emilio Bosurgi	
	as Trustee for Sociedad Anonima de Inversions Commerciales e Industriales	
	Via Consolare Pompea, 29	
	Villagio Pace	
	Messina, Italy	
	Emilio Bosurgi	
	as Executor of the Estate of Adiana Bosurgi	
	Via Consolare Pompea, 29	
	Villagio Pace	
	Messina, Italy	
n 26-72	Filed summons with ~~m~~ no return noted.	
n 26-72	Filed summons with marshal's ret. Served Leone Bosurgi, as Agent; and Emilio Bosurgi as Agent, (nine summons) on 6/2/72; Served W. Sanderson & Sons by W. Rosenberger on 5/24/72. by Dodge & Olcott, Inc. " " " Fritzsche Bros. Inc. " Emilio Bosurgi, as Executor on 5/23/72. by Boris Kostelanetz, (2 services). Est. of Adriana Bosurgi by Boris Kostelanetz on 5/23/72; and Sociedad Anonima de Inversions, etc. by Samuel Gottlieb, as Agent, and by Bernard Beitel, as Agent	

DUFFY, J

JUDGE DUFFY

JUDGE BRIANT

PROCEEDINGS

DATE	PROCEEDINGS	Date Judgment
Jul 10-72	Filed stip and order that deft S.A.I.C.I.'s time to appear and answer is extended to 7-21-72 Briant J.	
Jul 10-72	Filed stip and order that deft and 3rd pty deft's mtion dated 5-17-72 ~~xxxxxxxxxx~~ now ret. 7-11-72 be withdrawn. Briant J.	
Jul 12-72	Filed MEMO. END. on motion filed 5-19-72 Motion withdrawn. So Ordered. Briant J.	
Jul 21-72	Filed Answer of def-3rd pty.deft. Sociedad Anonima to cross and 3rd pty.claims.	
Jul 21-72	Filed Answer of deft. Sociedad Anonima de Inver. comm. e Indus. to amended complaint.	
Jul 27-72	Filed Certificate of Mailing summons and complaint by registered mail, return receipt requested addressed to: Sociedad Anonima de Iverrions Commerciales e Industriales Calle Paraguay 1282 Montevideo, Uruguay Receipt #305073. Rec. acknowledgement on 8-14-72	
Jul 31-72	Filed notice of rejection of a supplemental Amended Summons and Amended complaint of pltff.	
Aug 10-72	Filed Supplemental Amended Summons with Marshal's return--Served Emilo Bosurgi on 7-26-72	
Oct. 5-73	Filed pltff's notice to take deposition and request for production of documents from deft. Benedict Ginsberg on 10-24-73.	
Oct. 5-73	Filed pltff's notice to take deposition and request for production of documents from deft. Sociedad Anonima de Inversiones Commerciales e Industriales.	
Oct.18-73	Filed affdvt.& notice of motion for a protective order restraining the pltff.from taking the deposition of Benedict Ginsberg...Ret.10-30-73 at 2:15 p.m.	
Oct 18-73	Filed notice by Benedict Ginsberg to suspend deposition by Benedict Ginsberg.	
Oct 23-73	Filed pltff's affdvt. by David P. Sand in opposition to motion by deft. Benedict Ginsberg to stay hisdeposition, etc.	
Oct 26-73	Filed stip & order extending time for deft. Sociedad Anonima De Inversiones Comerciales e Industriales ("Saica") to comply or move for a protective order with regard to Req est for Productionof Documents to 11-14-73. DUFFY, J.	
Oct.30-73	Filed reply affdvt. of Benedict Ginsberg deft appearing pro-se. in support of motion for a protective order..	
Nov. 1-73	Filed stip & order that the time for deft. Sociedad Anonima De Inversiones Comerciales e Industriales ("SAICI") to comply for a protective order, etc. is extended up to and including the 10th day following the entry of an order as indicated. DUFFY, J.	
Nov 15-73	Filed Affidavit of Benedict Ginsberg to bring to the attention of this Court the decision of the Appellate Division of the Supreme Court as indicated.	
Nov 15-73	Filed memo endorsed on motion filed 10-18-73. Since the government has permitted the State Court Action to reach such a point that attorney's fees are to be set, the requested protective order will be granted until such a determination has been made in the state court. So ordered. Duffy, J. MAILED NOTICES.	
Nov. 20-73	Filed stip & order that deft. Sociedad Anonima de Inversiones Commerciales e Industriales' time to move for a protective order is extended to 12-14-73. So ordered- DUFFY, J.	
Nov. 14-73	Filed deft. Sociedad Anonima de Inversiones Commerciales e Industriales (hereinafter "Saici") affdvt. and order to show cause for an order staying depositions and discovery herein by pltff. Ret. 12-20-73 at 10:00 o'clock in the forenoon. DUFFY, J.	
Nov. 20-73	Before DUFFY, J. hearing begun and concluded. On deft. Saici order to show cause ret 12-14-73, to stay depositions and discovery by pltff and vacating the notice to take depositions & request for production of documents served by pltff. on Saici.	

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JUDGE DUFFY

DATE	PROCEEDINGS	Date Ord. Judgment
Jan21-74	Filed defts application on behalf of said Saici for summary judgment.	
Jan21- 74	Filed memorandum on behalf of deft Sociedad Anonima De Inversione Comerciales E. Indus triales ("Saici") in support of its application for summary judgment.	
Jan29-74	Filed application on behalf of Benedict Ginsberg for summary judgment, dismissing the complaint herein as indicated.	
Feb 7-74	Filed pltffs Affidavit & Notice of Motion before Duffy, J. for summary judgment purs to Rule 56 of the F.R.C.P. AS INDICATED.	
Feb7-74	Filed pltffs memorandum of law in support of its motion for summary judgment to dismiss the claim of Saici etc. as indicated.	
Feb. 7-74	Filed deft. Chemical Bank New York Trust Co. notice of motion for an order for summary judgment. Ret. 2-20-74.	
Feb. 7-74	Filed memorandum of deft. Chemical Bank in support of its motion for summary judgment and in opposition to deft. Benedict Ginsberg's motion for an order authorizing him to distribute funds held by him in escrow.	
Feb.20-74	Filed Memorandum of Law by the United States in opposition to motion for summary judgment by Chemical Bank	
April 3-74	Filed deft. Sociedad Anonima de Inversiones Comerciales e Industriales statement (Saici) pursuant to Rule 9 (g).	
April 3-74	Reply brief of deft. Saici in support of its motion for summary judgment and in opposition to the motion of pltff. for summary relief.	
Apr.4-74	Filed deft. Ginsberg's statement pursuant to Rule 9(g)	
Apr. 4-74	Filed deft. Ginberg's memorandum in opposition to pltff's motion for summary judgment-in support of deft's motion to dismiss the complaint as indicated.	
Apr. 10-74	Filed pltff's statement pursuant to Rule 9 (g) in response to deft. Benedict Ginsberg's motion for summary judgment.	
Apr. 10-74	Filed pltff's supplemental memorandum of law in response to (1) the reply brief by Saici and its Rule 9 (g) statement and (2) the reply brief by Benedict Ginsberg and his rule 9 (g) statement.	
Apr. 15-74	Filed deft. Chemical Bank's reply memorandum to memoranda of pltff. and deft. Benedict Ginsberg	
Apr. 16-74	Filed supplemental memorandum on behalf of deft. Benedict Ginsberg	
Apr. 23-74	Filed pltff's affdvt. of David P. Land in support of contention there is a genuine issue of material fact to be tried.	
Apr. 25-74	Filed deft. Benedict Ginsberg's affdvt. in response to affdvt. of David P. Land.	
Feb. 25-75	Filed Opinion # 41944 and Order- for the reasons stated- Sociedad Anonima de Inversiones Comerciales e Industriales (hereinafer "SAICI") motion for summary judgment is granted and the complaint against it is dismissed- the U.S' motion for summary judgment is denied- Ginsberg's motion for summary judgment is granted in so far as the complaint against Ginsberg is dismissed.- Chemical Bank's motion for summary judgment is granted and the complaint against Chemical Bank is dismissed.- the order of this Court dated 3-18-71, setting up the escrow account in this matter is vacated- and the default judgment against Bosurgis (in rem) is vacated. So ordered- DUFFY, J. (m/n)	
Apr. 21-75	Filed pltff's notice of appeal from the order dated and filed 2-25-75. Copies mailed to: Wainsburg, Gottlieb, Levitan & Cole- Benedict Ginsberg and Cravath, Swaine & Moore. Entered- 4-21-75	
Apr28-75	Filed Affidavit of Benedict Ginsberg (one of defts herein) appearing pro se and object to the order amending the order of Feb 25-1975 etc. as indicated.	
May 29-75	Filed defendant Saicis Memo. of law in support of its application for stay discovery, etc. received by U.S. Atty. on 12-14-73	
May 29-75	Filed U.S. Govt's Memo. of law in support of application to proceed with discovery. Copy received defts on Dec. 20-73.	
May 29-75	Filed memo. on behalf of Sociedad Anonima, etc. Filed in court Jan 18-72.	

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COMPLAINT DATED MARCH 2, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED; AND LEON BOSURGI AND EMILO BOSURGI,

Defendants.

----------x

Filed 3/2/71

VERIFIED COMPLAINT

71 Civ. 928

Plaintiff, United States of America, by its attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, for its complaint herein alleges upon information and belief, as follows:

1. This is a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of this Court.

2. This action is commenced pursuant to Sections 7401, 7403 and 7404 of the Internal Revenue Code of 1954 at the direction of the Attorney General of the United States with the authorization and direction and at the request of the Commissioner of Internal Revenue, a

delegate of the Secretary of the Treasury of the United States.

3. This Court has jurisdiction of this action under 28 U. S. Code 1340 and 1345 and under Section 7402(a) of the Internal Revenue Code of 1954.

4. On information and belief, Adriana Bosurgi, a nonresident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at the defendant, Chemical Bank (hereafter the Bank). No nonresident estate tax return was filed by or on behalf of the estate.

5. On information and belief, defendants Leon Bosurgi and/or Emilo Bosurgi instructed the Bank to sell the securities and deposit the proceeds belonging to the Estate of Adriana Bosurgi to an account in the name of the defendants, Leon Bosurgi and Emilo Bosurgi.

6. On information and belief, the defendants, Leon Bosurgi and Emilo Bosurgi, instituted an action against the Bank, in the Supreme Court, New York County, Index No. 7939-66 in connection with certain advice the Bank gave to Leon Bosurgi and Emilo Bosurgi with respect to the funds in their account at the Bank and pursuant to a settlement of this action, the Bank will pay to the defendants, Leon Bosurgi and Emilo Bosurgi, the sum of $215,000.

7. As provided for by law, on March 2, 1971, a delegate of the Secretary of the Treasury of the United

States made four jeopardy assessments arising out of the estate tax liability of the Estate of Adriana Bosurgi, deceased, as follows: first, an assessment against Leon Bosurgi and Emilo Bosurgi as Executors of the Estate of Adriana Bosurgi; second, against Chemical Bank as Statutory Executor of the Estate of Adriana Bosurgi; third, against Leon Bosurgi as transferee of assets of the Estate of Adriana Bosurgi; and fourth, against Emilo Bosurgi as transferee of assets of the Estate of Adriana Bosurgi, each assessment being in the amount of $403,988.78 in estate tax, $100,997.20 in penalty and $161,794.74 in interest; and the total of each assessment being $666,780.72, plus interest as provided by law. Notice of the aforementioned assessments and demand for the payment thereof was made by the Secretary or his delegate on March 2, 1971, but there is still due and owing the assessed amount plus interest as provided by law.

8. On information and belief, the transfer of the amount to be paid by the Bank to the defendants, Leon Bosurgi and Emilo Bosurgi, pursuant to their settlement of the civil action in the Supreme Court, New York County, herein described will jeopardize the collection of estate taxes due and owing to the plaintiff, United States of America.

WHEREFORE, the United States of America, plaintiff herein, prays as follows:

(1) That this Court issue a temporary restraining order and preliminary injunction restraining any payment by the Bank to the defendants, Leon Bosurgi and Emilo Bosurgi, and further proceedings by the said defendants in the state court action herein described;

(2) That this Court adjudge and decree that the defendants are indebted to the United States of America in the sum of $666,780.72, plus interest, as provided by law;

(3) That this Court adjudge and decree that the United States of America has valid and subsisting liens for its tax claims;

(4) That this Court foreclose the liens of the United States of America against the amount the Bank will pay defendants Leon Bosurgi and Emilo Bosurgi under the settlement of a civil action in the Supreme Court, New York County, Index No. 7939-66;

(5) That this Court order the Bank to deposit any money to be paid under its settlement with the defendants Leon Bosurgi and Emilo Bosurgi in an interest-bearing account pending a determination of the United States of America's claims; and

wIS:mm

(6) That this Court grant such other and different relief as seems just and proper under the circumstances, including the costs of the plaintiff herein.

Dated: New York, New York

March 2, 1971

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff

By: _____
MICHAEL I. SALTZMAN
Assistant United States Attorney
Office and Post Office Address:
United States Court House
Foley Square
New York, New York 10007

USA-33s-241

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VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL I. SALTZMAN, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and as such has charge of the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters herein stated to be alleged on information and belief and that as to those matters he believe it to be true.

That the sources of deponent's information and the grounds of his belief are official records and files of the United States.

~~That the reason this verification is made by deponent and not by that is a corporation sovereign.~~

MICHAEL I. SALTZMAN
Assistant United States Attorney

Sworn to before me this
2nd day of March 1971.

WALTER G. BRANNON
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Certificate filed in New York County
Term Expires March 30, 1971

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Filed
3/3/71 (3)

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
DATED MARCH 2, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 CIV. 928

UNITED STATES OF AMERICA,

Plaintiff,

-v-

LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED: AND LEON BOSURGI AND EMILO BOSURGI,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

71 Civ. 928

Upon motion of the United States Attorney for the Southern District of New York, and the annexed verified complaint, let the above named defendants show cause before this Court at 10:00 o'clock in the forenoon on the ~~6th~~ day of March, 1971, or as soon thereafter as counsel can be heard, in Courtroom 506, United States Courthouse, Foley Square, New York, New York, why a preliminary injunction should not be issued restraining the defendant Chemical New York Bank from paying over to the defendants Leon Bosurgi and Emilo Bosurgi the sum of $215,000, and directing the defendant Chemical New York Bank to deposit the aforementioned fund of $215,000 in an interest bearing account pending a final determination of this action; and it is further

ORDERED that the defendant Chemical is hereby restrained from transferring to any person, including but not limited to the other defendants herein, their attorneys, agents employees or others associated with them, any property whatsoever, including but not limited to any amounts payable pursuant to any settlement agreement or order in this action pending in the Supreme Court, New York County entitled Leon Bosurgi and Emilo Bosurgi v. Chemical New York Bank, Docket No. 7939-66, pending the hearing and determination of the motion for the preliminary injunction herein; and it is further

ORDERED that the defendants Leon Bosurgi and Emilo Bosurgi, their attorneys, agents, employees, or others associated with them, are hereby restrained from transferring to any person or from themselves from the jurisdiction of this Court any amounts received in the settlement of the above described action now pending in the Supreme Court, New York County pending the hearing and determination of the motion for the preliminary injunction herein; and it is further

ORDERED that service of a copy of this order and the verified complaint herein upon defendants shall be made on or before 5:00 P.M. on the 2nd day of March, 1971, and such service shall be deemed good and sufficient service hereof.

Dated: New York, New York
March 2, 1971

U. S. D. J.

MAR 5 '1971 Motion denied following argument-
Mr Saltzman settle order on notice in accordance with the
71-0572 Court's ruling.

U.S.D.J.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECU OF THE ESTATE OF ADRIANA BOSURGI DECEASED; AND LEON BOSURGI AND EMILO BOSURGI,

Defendants

Civ.

U.S. DISTRICT COURT
FILED
MAR 10 1971
S.D. OF N.Y.

WHITNEY NORTH SEYMOUR, JR.

TEL. 264-6321

United States Attorney
Attorney for U.S.A.

Due service of a copy of the within is hereby admitted.

New York, ..., 19....

Attorney for

To

Attorney for

FPI—S3—1-13-70—30M—4026

Copy Rec'd
Chambers
Returning
attorney's
(illegible)

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ANSWER, COUNTERCLAIM AND CROSS-CLAIMS BY CHEMICAL BANK DATED MARCH 12, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED: AND LEON BOSURGI AND EMILO BOSURGI, Defendants, -and- ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ., Additional Defendants to Counterclaim and Cross-Claim for Interpleader.	71 Civ. 928 ANSWER, COUNTERCLAIM AND CROSS-CLAIMS OF DEFENDANT CHEMICAL BANK

Defendant Chemical Bank, sued herein as an alleged Statutory Executor of the Estate of Adriana Bosurgi, deceased, for its answer to the complaint:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 1 through 3 thereof, except that (a) this action purports to be a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of the Court; (b) the action purports to have been commenced pursuant to the sections of the Internal Revenue Code of 1954 referred to in paragraph 2 of said complaint at the direction of

the Attorney General of the United States and with the authorization and direction and at the request of the Commissioner of Internal Revenue; and (c) jurisdiction is purported to arise under the sections of the United States Code and the Internal Revenue Code of 1954 referred to in paragraph 3 of said complaint.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4 thereof except that, as of March 27, 1963, there were held by defendant Chemical Bank in a custodian account in the name of Adriana Bosurgi with a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi securities having a value of approximately $1,000,000 as of such date.

3. Denies the averments of paragraph 5 thereof, except that in or about April 1963, defendant Leone Bosurgi instructed defendant Chemical Bank, pursuant to the aforesaid power of attorney, to sell the securities in the custodian account in the name of Adriana Bosurgi, to close that account and open a new custodian account jointly in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of securities held in the custodian account in the name of Adriana Bosurgi.

4. Denies the averments of paragraph 6 thereof, except that on March 14, 1966, a summons was served on defendant Chemical Bank in an action in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co.; that on May 10, 1966, a complaint was served on defendant Chemical Bank in said action; and that

on September 15, 1970, said action was settled pursuant to a stipulation on the record of said Court and respectfully refers the Court to the summons, the complaint and the stipulation on the record in said action for their contents.

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof, except that on or about March 2, 1971, and on or about March 4, 1971, defendant Chemical Bank received four Notices of Levy (Form 668-A), each dated March 2, 1971, and a Statement of Tax Due IRS (Form 17-A) dated March 2, 1971, respectively, and respectfully refers the Court to said Notices and Statement for their contents.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8 thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, AVERS:

7. At the time that defendant Chemical Bank received and acted upon the instructions referred to in paragraph 3 hereof, it did not know or have reason to know that Adriana Bosurgi had earlier died.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, AVERS:

8. The jeopardy assessment as to defendant Chemical Bank was and is arbitrary and capricious and is, therefore, without force or effect.

AS AND FOR A COUNTERCLAIM AND CROSS-CLAIM FOR INTERPLEADER AS TO CLAIMANTS UNITED STATES OF AMERICA, LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ., AVERS:

9. This is a counterclaim and cross-claim for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure and Title 28, U.S.C. §§ 1335, 2361 and 2410 for a determination of adverse claims to a sum of $215,000.

10. The jurisdiction of this Court is founded on Title 28, U.S.C. §§ 1331 and 1340, the interpleaded claims arising under the internal revenue laws of the United States; Title 28, U.S.C. §§ 1332 and 1335, there being the requisite diversity of citizenship among the claimants; and the ancillary jurisdiction of this Court. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

11. Defendant Chemical Bank is a banking corporation duly organized under the laws of the State of New York.

12. Defendants Leone Bosurgi and Emilio Bosurgi (named in the complaint herein as Leon Bosurgi and Emilo Bosurgi), sued herein individually and as executors of the Estate of Adriana Bosurgi, deceased, are citizens of Italy and/or Argentina.

13. Additional defendant Estate of Adriana Bosurgi, deceased, is a citizen of Italy.

14. Additional defendant Benedict Ginsberg, Esq., is a citizen of the State of New York.

15. In connection with an action pending in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co., a stipulation of settlement was entered on the record providing for the payment by

defendant Chemical Bank to defendants Leone Bosurgi and Emilio Bosurgi, subject to certain conditions, of the sum of $215,000.

16. Defendant Chemical Bank has in its possession the sum of $215,000 to be paid to defendants Leone Bosurgi and Emilio Bosurgi as set forth in paragraph 15 hereof. Pursuant to an order to be settled before Hon. Dudley B. Bonsal, a Judge of this Court, on March 18, 1971, the foregoing sum is to be paid to Benedict Ginsberg, Esq., to be held in custodia legis.

17. Plaintiff claims tax liens with respect to the sum referred to in paragraph 16 hereof as set forth in the complaint herein.

18. Defendants Leone Bosurgi and Emilio Bosurgi in their individual capacities claim that they are the rightful owners of the sum referred to in paragraph 16 hereof free and clear of any lien or interest of plaintiff.

19. Additional defendant Estate of Adriana Bosurgi, deceased, and defendants Leone Bosurgi and Emilio Bosurgi, as executors of said Estate, may claim an interest in the sum referred to in paragraph 16 hereof on behalf of said Estate, said sum being in settlement of claims against defendant Chemical Bank involving assets which may have been derived from securities held at defendant Chemical Bank in a custodian account in the name of Adriana Bosurgi and which may have been the property of Adriana Bosurgi at the time of her death.

20. Additional defendant Benedict Ginsberg, Esq., claims a right to receive $78,491.32 as attorney's fees in connection with his representation of defendants Leone

Bosurgi and Emilio Bosurgi in the action referred to in paragraph 15 hereof from the sum referred to in paragraph 16 hereof, notwithstanding any lien or interest of plaintiff or of any other claimant in said sum.

21. Defendant Chemical Bank may have an interest in the sum referred to in paragraph 16 hereof by reason of the claims asserted against Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, in paragraphs 22 through 36 hereof.

AS AND FOR A SECOND CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

22. The complaint avers, in substance, that this is a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of this Court; that Adriana Bosurgi, a nonresident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at defendant Chemical Bank; that a nonresident estate tax return was not filed by or on behalf of the estate of Adriana Bosurgi; that defendants Leone Bosurgi (sued herein as Leon Bosurgi) and/or Emilio Bosurgi (sued herein as Emilo Bosurgi) instructed defendant Chemical Bank to sell the securities and deposit the proceeds allegedly belonging to the Estate of Adriana Bosurgi in an account in the name of defendants Leone Bosurgi and Emilio Bosurgi; that, as provided by law, on March 2, 1971, a delegate of the Secretary of the Treasury of the United States made a jeopardy assessment arising out of the alleged estate tax liability of the Estate of Adriana Bosurgi, deceased, against defendant Chemical Bank as an

alleged Statutory Executor of the Estate of Adriana Bosurgi in the amount of $403,988.78 in estate tax, $100,997.20 in penalty and $161,794.74 in interest, the total being $666,780.72, plus interest as provided by law; and that notice of the aforesaid assessment and demand for the payment thereof was made by the Secretary or his delegate on March 2, 1971.

23. Defendant Leone Bosurgi, acting in concert with defendant Emilio Bosurgi, pursuant to a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi, instructed defendant Chemical Bank to sell the securities in the account referred to in paragraph 22 hereof, to close that account and open a new custodian account in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of the aforesaid securities.

24. At the time the instructions referred to in paragraph 23 hereof were given, defendant Chemical Bank did not know that Adriana Bosurgi had earlier died and was not advised of her death by either of defendants Leone Bosurgi and Emilio Bosurgi.

25. Defendant Chemical Bank acted in accordance with the instructions of defendant Leone Bosurgi referred to in paragraph 23 hereof, and defendants Leone Bosurgi and Emilio Bosurgi thereafter gained and exercised full control, benefit, use and enjoyment of all the assets previously held in the account in the name of Adriana Bosurgi without having paid any federal estate taxes that may have been, or may be, due the United States of America in respect of the estate of Adriana Bosurgi.

26. In the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant is entitled to judgment against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A THIRD CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

27. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 25 hereof as if fully set forth herein.

28. Defendants Leone Bosurgi and Emilio Bosurgi well knew when Leone Bosurgi gave the instructions referred to in paragraph 23 hereof that Adriana Bosurgi had earlier died.

29. In purporting to act pursuant to the power of attorney referred to in paragraph 23 hereof without disclosing the antecedent death of Adriana Bosurgi, defendant Leone Bosurgi, acting in concert with defendant Emilio Bosurgi, committed fraud and deceit upon defendant Chemical Bank.

30. In the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant is entitled to judgment against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FOURTH CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

31. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 25 hereof as if fully set forth herein.

32. If the securities in the account referred to in paragraph 22 hereof were the property of Adriana Bosurgi at the time of her death, defendant Leone Bosurgi, in concert with defendant Emilio Bosurgi, acted as an executor of the Estate of Adriana Bosurgi, deceased, in giving the instructions referred to in paragraph 23 hereof.

33. In the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant is entitled to judgment against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FIFTH CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, AVERS:

34. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 25 hereof as if fully set forth herein.

35. Having obtained full control, benefit, use and enjoyment of the assets in the account in the name of Adriana Bosurgi, defendants Leone Bosurgi and Emilio Bosurgi are constructive trustees of such assets if such assets were the property of Adriana Bosurgi at the time of her death.

36. In the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant is entitled

to judgment against defendants Leone Bosurgi and Emilio Bosurgi for the amount of any such judgment.

WHEREFORE, defendant Chemical Bank demands:

(1) judgment dismissing the complaint in the above-entitled action as to it with costs;

(2) with respect to its counterclaim and cross-claim for interpleader, that:

(a) the Court enter an order joining the Estate of Adriana Bosurgi, deceased, and Benedict Ginsberg, Esq., as additional parties defendant to the said counterclaim and cross-claim for interpleader;

(b) the Court issue its process for all claimants pursuant to Title 28, U.S.C. § 2361;

(c) the Court require plaintiff, defendants and additional defendants to interplead their respective claims; and

(d) judgment be entered determining (i) the claimant or claimants entitled to the sum of $215,000 herein referred to and (ii) the amount to which each such claimant is entitled; and

(3) with respect to its second, third, fourth and fifth cross-claims, that, in the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased,

with costs.

March 12, 1971.

CRAVATH, SWAINE & MOORE

by

John W. Barnum

A member of the firm

Attorneys for Defendant
Chemical Bank,
1 Chase Manhattan Plaza,
New York, N. Y. 10005

AFFIDAVIT BY BENEDICT GINSBERG, ESQ. DATED MARCH 18, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEON BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al.,

Defendants.

- X

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF COUNTER ORDER

71 Civ. 928

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in an action instituted in the Supreme Court of the State of New York, County of New York, in which LEONE BOSURGI and EMILIO BOSURGI are plaintiffs and CHEMICAL BANK NEW YORK TRUST COMPANY is the defendant.

I submit this affidavit in response to the affidavits of HOWARD G. KRISTOL, dated March 16, 1971, and March 17, 1971, in support of a counter-order submitted by him on behalf of CHEMICAL BANK.

Mr. Kristol concedes that his proposed counter-order is not in compliance with the Court's decision on the argument of the motion. His affidavit of March 16 states:

> "After hearing counsel for plaintiff, counsel for defendant Chemical Bank and Mr. Ginsberg, the Court denied plaintiff's motion on the condition that the settlement sum of $215,000

be delivered to Mr. Ginsberg for the purpose of purchasing certificates of deposit of Chase Manhattan Bank, such certificates thereafter to be held by him subject to further order of the Court."

The proposed order which I submitted is consistent with the foregoing. Mr. Kristol's reason for submitting a proposed counter-order which is not consistent with the foregoing, is that after the conclusion of the hearing, I informed him that I was counsel for the Bosurgi brothers in the state court action, I was not authorized to appear for them in the present action, and that it was my belief that Messrs. Kostelanetz and Ritholz would be appearing in the action in due course on behalf of the Bosurgi brothers.

Mr. Kristol then refers to the fact that when, on the third day after the argument of the motion, he attempted to serve upon me, and upon Messrs. Kostelanetz and Ritholz, a cross-claim of interpleader by Chemical Bank against the Bosurgi brothers, both I and the Kostelanetz firm refused to accept service on the ground that we had not been authorized to appear on behalf of those defendants.

Mr. Kristol concludes that our refusal prematurely to appear presents some sinister conduct on our part and that the Court should therefore permit his clients to retain the proceeds of the state court settlement, in the form of certificates of deposit, rather than have me retain them in accordance with the terms of the stipulation of settlement entered into and dictated on the record in the Supreme Court action.

Mr. Kristol also complains that my proposed order does not contain any recital or direction that I should hold the settlement proceeds and states "it would seem that Mr. Ginsberg no longer seeks to have the Court grant that relief" (par. 7, Kristol affidavit of March 16).

My proposed order recites precisely what the Court said and what everybody understood at the conclusion of the argument, to wit, that the motion was denied with leave to the Bosurgi brothers to take such proceedings in the state court action as may be appropriate under the stipulation of September 15, 1970, "except that the proceeds of said settlement shall not be disbursed without further order of this court".

The stipulation recites that the proceeds of the settlement are to be paid to me and held in escrow with the entire amount of the settlement to be in the form of certificates of deposit. I saw no need to repeat in my proposed order, the terms of the stipulation, a copy of which was attached to the affidavit that I submitted in opposition to the order.

I regret the necessity of burdening the court with this further affidavit, but in view of the unwarranted as well as inaccurate conclusions upon which Mr. Kristol's affidavits are based, there was no alternative.

Benedict Ginsberg

Sworn to before me, this
18th day of March, 1971.

PAUL TEICHMAN
Notary Public, State of New York
No. 30-3047015
Qualified in Nassau County
Commission Expires March 30, 1972

USA-33s-184 - NOTICE OF SETTLEMENT - Judge's Signature

MIS:eb
71-0572

Filed
3/18/71

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

- v -

LEON BOSURGI and EMILO BOSURGI, Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al.,

Defendants.

NOTICE OF SETTLEMENT

71 Civ. 928

----------X

S I R S:

PLEASE TAKE NOTICE that the within Order will be presented for settlement and signature to the Honorable Dudley B. Bonsal, United States District Judge, at the office of the Clerk, Room 601, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 18th day of March, 1971, at 4:30 o'clock in the ~~forenoon~~ afternoon, or as soon thereafter as counsel can be heard.

Dated: New York, N.Y.
March , 1971

Yours etc.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for United States
Office & Post Office Address:
United States Court House
Foley Square
Borough of Manhattan
City of New York, N.Y. 10007
Tel.: 264-6321

TO:

Howard J. Kristol, Esq.
Cravath Swaine & Moore
1 Chase Manhattan Plaza
New York, New York

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York

MLS:eb
71-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

: ORDER

- v - : 71 Civ. 928

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

The motion of the United States of America for a preliminary injunction having been made upon the verified complaint of the United States of America, and having come on for a hearing before the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, and upon oral argument of counsel for plaintiff, defendant Chemical Bank, and Benedict Ginsberg, Esq., it is hereby

ORDERED that the motion of the United States of America for a preliminary injunction is denied subject to the following:

(1) That within 20 days from the date of entry of this order, defendant Chemical Bank pay over to Benedict Ginsberg, attorney for the defendants Leon and Emilo Bosurgi in a proceeding in the Supreme Court, New York County, New York, entitled Leon and Emilo Bosurgi v. Chemical New York Bank, Docket No. 7939/66, the sum of

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71-0572

$215,000, which sum is the amount to be paid under a settlement entered into by and between the parties to the said State court action; and further

(2) That the said Benedict Ginsberg, Esq. purchase with the said $215,000, certificates of deposit of the Chase Manhattan Bank; and further

(3) That the said Benedict Ginsberg, Esq. have and hold the said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000.

Dated: New York, New York

March 18, 1971

/s/ Dudley B. Bonsal

U. S. D. J.

CROSS-NOTICE OF SETTLEMENT BY BENEDICT GINSBERG, ESQ. DATED MARCH 12, 1971 AND PROPOSED ORDER NOT ISSUED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al.,

Defendants.

CROSS-NOTICE OF SETTLEMENT

71 Civ. 928

- X

S I R S :

PLEASE TAKE NOTICE, that the within order will be presented for settlement and signature to the Honorable Dudley B. Bonsal, United States District Judge, at the office of the Clerk, Room 601, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 18th day of March, 1971, at 4:30 o'clock in the afternoon, or as soon thereafter as counsel can be heard.

Dated: New York, New York,
March 12, 1971.

Yours, etc.,

BENEDICT GINSBERG
Attorney for Defendants
Leone Bosurgi and Emilio Bosurgi
475 Fifth Avenue
New York, New York 10017
MU 3-7079

TO:

WHITNEY NORTH SEYMOUR, JR., ESQ.
United States Attorney for the
Southern District of New York
Attorney for United States
United States Court House
Foley Square
New York, New York 10007

HOWARD G. KRISTOL, ESQ.
CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Defendant Chemical Bank
1 Chase Manhattan Plaza
New York, New York 10005

MAR 15 1971
UNITED STATES ATTORNEY
SO. DIST. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORDER

71 Civ. 928

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al.,

Defendants.
- X

The motion of the United States of America for a preliminary injunction having been made upon the verified complaint of the United States of America, and having come on for a hearing before the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, and upon oral argument of counsel for plaintiff, defendant Chemical Bank, and Benedict Ginsberg, Esq., it is hereby

ORDERED, that the motion of the United States of America for a preliminary injunction is denied, and it is further

ORDERED, that the parties in an action in the Supreme Court of the State of New York, County of New York, entitled LEONE BOSURGI and EMILIO BOSURGI, Plaintiffs, against CHEMICAL BANK NEW YORK TRUST COMPANY, Defendant, Index No. 7939/1966, may take such proceedings therein as may be appropriate under the terms of the stipulation dated September 15, 1970, except that the proceeds of said settlement shall not be disbursed without further order of this Court.

Dated: New York, New York,
March , 1971.

U. S. D. J.

DEMAND FOR JURY TRIAL DATED MARCH 22, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED: AND LEON BOSURGI AND EMILO BOSURGI, Defendants, -and- ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ., Additional Defendants to Counterclaim and Cross-Claim for Interpleader.	71 Civ. 928 DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that defendant Chemical Bank demands a trial by jury in the above-entitled action of all issues triable by jury.

March 22, 1971.

CRAVATH, SWAINE & MOORE,

by John G. Dawson
a member of said firm

Attorneys for Defendant
Chemical Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

TO:

WHITNEY NORTH SEYMOUR, JR., ESQ.,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y. 10007

BENEDICT GINSBERG, ESQ.,
475 Fifth Avenue,
New York, N. Y. 10017

MESSRS. KOSTELANETZ & RITHOLZ,
52 Wall Street,
New York, N. Y. 10005.

CLERK OF THE ABOVE-NAMED COURT.

TO DOCKET CLERK

PLEASE DOCKET AND RETURN
TO ROOM 601 WITH DOCKET
SHEETS.

THANK YOU.

(10)

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NOTICE OF APPEAL BY CHEMICAL BANK DATED MARCH 24, 1971 IN RESPECT OF THE DISTRICT COURT'S MARCH 18, 1972 ORDER

ICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED: AND LEON BOSURGI AND EMILO BOSURGI, Defendants, -and- ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ., Additional Defendants to Counterclaim and Cross-Claim for Interpleader.	71 Civ. 928 NOTICE OF APPEAL

U.S. DISTRICT COURT FILED MAR 24 1971 S. D. OF N. Y.

PLEASE TAKE NOTICE that defendant Chemical Bank hereby appeals to the United States Court of Appeals for the Second Circuit from so much of an order entered in this action on March 18, 1971, as directs defendant Chemical Bank to pay over the sum of $215,000 to Benedict Ginsberg, Esq.

March 24, 1971.

CRAVATH, SWAINE & MOORE,
Attorneys for Defendant
Chemical Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

TO:

WHITNEY NORTH SEYMOUR, JR., ESQ.,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y. 10007

BENEDICT GINSBERG, ESQ.,
475 Fifth Avenue,
New York, N. Y. 10017

MAR 31 1971

UNITED STATES ATTORNEY
SO. DIST. OF N. Y.

MIS:eb
71-0572

AFFIDAVIT BY ASSISTANT UNITED STATES ATTORNEY
MICHAEL I. SALTZMAN DATED APRIL 19, 1971

Filed
4/19/71

(-0836)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT

: Docket No.
~~71-0836~~

LEON BOSURGI and
EMILO BOSURGI, as Executors of
the Estate of Adriana Bosurgi,
Deceased, and CHEMICAL BANK,
et al., : 71-134X

Defendants

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL I. SALTZMAN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for the United States of America, and am in charge of, and familiar with the captioned action.

2. The Government instituted the captioned action to reduce jeopardy assessments of estate taxes against Leon Bosurgi and Emilo Bosurgi (hereinafter referred to as ("the Bosurgi Brothers"), as statutory executors and transferees of the Estate of Adriana Bosurgi, and also against the Chemical Bank as a statutory executor. The first object of the action was to prevent the amount of the settlement of an action in the Supreme Court, New York County, New York (Docket No. 7939/66), between the Bosurgi Brothers and the Chemical Bank from being transferred, in whole or in part, outside the United States, or otherwise being transferred in derogation of the rights of the United States.

3. On March 2, 1971, the Government obtained an order temporarily restraining the consummation of the settlement pending a hearing on its motion for a preliminary injunction. In its motion papers, the Government requested that the District Court order that the amount of the settlement be held by Chemical Bank

in the form of interest-bearing certificates of deposit, pending the Court's determination of the Government's rights to the fund.

4. On March 5, 1971, Judge Bonsal denied the Government's motion for a preliminary injunction. The order he signed directs Chemical Bank to pay the amount of the settlement to Benedict Ginsberg, Esq., a prospective claimant to the fund, or a portion thereof, as the attorney for the Bosurgi Brothers in the State court action. However, the order also designates Benedict Ginsberg as custodian only; requires him to purchase certificates of deposit, and requires him further to hold these certificates subject to the Government's liens and to any further order of the Court. Accordingly, it is the Government's position (a) that its interests are protected under the order of the Court, despite the fact that the Court denied the specific relief prayed for in its motion for a preliminary injunction,

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and further (b) that it has no objection to the payment of the amount of the settlement into Court, as Chemical Bank requests, so long as the payment is made in the form of certificates of deposit or similar interest-bearing securities.

MICHAEL I. SALTZMAN
Assistant United States Attorney

Sworn to before me this

19 day of April, 1971

[illegible]
[illegible] New York

[illegible]
[illegible] York County
[illegible]

A 44

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of April one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,

HON. ROBERT P. ANDERSON,

Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Leon [illegible]sugi, et al.,
Defendants,

Chemic[illegible]nk,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

APR 27 1971
UNITED STATES ATTORNEY
[illegible] OF N. Y.

AMENDED ANSWER, COUNTERCLAIM, AND CROSS-CLAIM BY CHEMICAL BANK DATED MAY 11, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED; AND LEON BOSURGI AND EMILO BOSURGI,

Defendants.

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ.,

Additional Defendants to Counterclaim and Cross-Claim for Interpleader,

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED,

Third-Party Defendants.

71 Civ. 928

AMENDED ANSWER, COUNTERCLAIM AND CROSS-CLAIMS OF DEFENDANT CHEMICAL BANK

Defendant Chemical Bank, sued herein as an alleged Statutory Executor of the Estate of Adriana Bosurgi, Deceased, for its answer to the complaint:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 1 through 3 thereof, except that (a) this action purports to be a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of the Court; (b) the action purports to have been commenced pursuant to the sections of the Internal Revenue Code of 1954 referred to in paragraph 2 of said complaint at the direction of the Attorney General of the United States and with the authorization and direction and at the request of the Commissioner of Internal Revenue; and (c) jurisdiction is purported to arise under the sections of the United States Code and the Internal Revenue Code of 1954 referred to in paragraph 3 of said complaint.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4 thereof except that, as of March 27, 1963, there were held by Chemical Bank New York Trust Company later merged with defendant Chemical Bank pursuant to an agreement of merger effective February 17, 1969 (hereinafter referred to as "defendant Chemical Bank's predecessor"), in a custodian account in the name of Adriana Bosurgi with a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi securities having a value of approximately $1,000,000 as of such date.

3. Denies the averments of paragraph 5 thereof, except that in or about April 1963, defendant Leone Bosurgi

instructed defendant Chemical Bank's predecessor, purportedly pursuant to the aforesaid power of attorney, to sell the securities in the custodian account in the name of Adriana Bosurgi, to close that account and open a new custodian account jointly in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of securities held in the custodian account in the name of Adriana Bosurgi.

4. Denies the averments of paragraph 6 thereof, except that on March 14, 1966, a summons was served on defendant Chemical Bank's predecessor in an action in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co.; that on May 10, 1966, a complaint was served on defendant Chemical Bank's predecessor in said action; and that on September 15, 1970, said action was settled pursuant to a stipulation on the record of said Court and respectfully refers the Court to the summons, the complaint and the stipulation on the record in said action for their contents.

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof, except that on or about March 2, 1971, and on or about March 4, 1971, defendant Chemical Bank received four Notices of Levy (Form 668-A), each dated March 2, 1971, and a Statement of Tax Due IRS (Form 17-A) dated March 2, 1971, respectively, and respectfully refers the Court to said Notices and Statement for

their contents.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8 thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, AVERS:

7. At the time that defendant Chemical Bank's predecessor received and acted upon the instructions referred to in paragraph 3 hereof, it did not know or have reason to know that Adriana Bosurgi had earlier died.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, AVERS:

8. The jeopardy assessment as to defendant Chemical Bank was and is arbitrary and capricious and is, therefore, without force or effect.

AS AND FOR A COUNTERCLAIM AND CROSS-CLAIM FOR INTERPLEADER AS TO CLAIMANTS UNITED STATES OF AMERICA, LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, ESTATE OF ADRIANA BOSURGI, DECEASED, AND BENEDICT GINSBERG, ESQ., AVERS:

9. This is a counterclaim and cross-claim for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure and Title 28, U.S.C. §§ 1335, 2361 and 2410 for a determination of adverse claims to a sum of $215,000.

10. The jurisdiction of this Court is founded on Title 28, U.S.C. §§ 1331 and 1340, the interpleaded claims arising under the internal revenue laws of the United States, Title 28, U.S.C. §§ 1332 and 1335, there being the requisite diversity of citizenship among the claimants; and the ancillary jurisdiction of this Court. The matter in

controversy exceeds, exclusive of interest and costs, the sum of $10,000.

11. Defendant Chemical Bank is a banking corporation duly organized under the laws of the State of New York with its principal place of business in the State of New York.

12. Defendants Leone Bosurgi and Emilio Bosurgi (named in the complaint herein as Leon Bosurgi and Emilo Bosurgi), sued herein individually and as executors of the Estate of Adriana Bosurgi, deceased, are citizens of Italy and/or Argentina.

13. Additional defendant Estate of Adriana Bosurgi, deceased, is a citizen of Italy.

14. Additional defendant Benedict Ginsberg, Esq., is a citizen of the State of New York.

15. In connection with an action pending in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co., a stipulation of settlement was entered on the record providing for the payment by defendant Chemical Bank to defendants Leone Bosurgi and Emilio Bosurgi, subject to certain conditions, of the sum of $215,000.

16. Pursuant to an order entered by this Court on March 18, 1971, defendant Chemical Bank has paid to additional defendant Benedict Ginsberg, Esq., the sum of $215,000 to be held by him in custodia legis in the form of certificates of deposit of Chase Manhattan Bank, subject to any and all liens of the United States and subject to any further order which may be made by this Court with regard to the rights of the United States and o. any other claimant to said sum of $215,000.

17. Plaintiff claims tax liens with respect to

the sum referred to in paragraph 16 hereof as set forth in the complaint herein.

18. Defendants Leone Bosurgi and Emilio Bosurgi in their individual capacities claim that they are the rightful owners of the sum referred to in paragraph 16 hereof free and clear of any lien or interest of plaintiff.

19. Additional defendant Estate of Adriana Bosurgi, deceased, and defendants Leone Bosurgi and Emilio Bosurgi, as executors of said Estate, may claim an interest in the sum referred to in paragraph 16 hereof on behalf of said Estate, said sum being in settlement of claims against defendant Chemical Bank involving assets which may have been derived from securities held at defendant Chemical Bank's predecessor in a custodian account in the name of Adriana Bosurgi and which may have been the property of Adriana Bosurgi at the time of her death.

20. Additional defendant Benedict Ginsberg, Esq., claims a right to receive $78,491.32 as attorney's fees in connection with his representation of defendants Leone Bosurgi and Emilio Bosurgi in the action referred to in paragraph 15 hereof from the sum referred to in paragraph 16 hereof, notwithstanding any lien or interest of plaintiff or of any other claimant in said sum.

21. Defendant Chemical Bank may have an interest in the sum referred to in paragraph 16 hereof by reason of the claims asserted against Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, in paragraphs 22 through 38 hereof.

AS AND FOR A SECOND CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

22. On or about March 27, 1963, there were held by defendant Chemical Bank's predecessor in a custodian account in the name of Adriana Bosurgi securities having a value of approximately $1,000,000 as of such date.

23. The custodian account referred to in paragraph 22 hereof was subject to a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi.

24. In or about April 1963, Leone Bosurgi, acting in concert with Emilio Bosurgi, purportedly pursuant to the power of attorney referred to in paragraph 23 hereof, instructed defendant Chemical Bank's predecessor to sell the securities in the account referred to in paragraph 22 hereof, to close that account and open a new custodian account in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of the aforesaid securities.

25. At the time the instructions referred to in paragraph 24 hereof were given to and acted on by defendant Chemical Bank's predecessor, it did not know that Adriana Bosurgi had earlier died and was not advised of her death by either of defendants Leone Bosurgi and Emilio Bosurgi, and said defendants thereafter gained and exercised full control, benefit, use and enjoyment of all the assets previously held in the account in the name of Adriana Bosurgi without having paid any federal estate taxes that may have been, or may be, due the United States of America in respect

of the estate of Adriana Bosurgi.

26. The Internal Revenue Service of the United States of America has asserted an estate tax claim in the total sum of $666,780.72 against defendant Chemical Bank as an alleged Statutory Executor of the Estate of Adriana Bosurgi, Deceased, has assessed defendant Chemical Bank for such sum and has levied upon certain property alleged to be in defendant Chemical Bank's possession.

27. On or about March 2, 1971, the United States of America commenced the within action in this Court seeking to foreclose certain alleged tax liens against property alleged to be within the jurisdiction of the Court. The complaint avers, in substance, that Adriana Bosurgi, a non-resident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at defendant Chemical Bank; that a nonresident estate tax return was not filed by or on behalf of the Estate of Adriana Bosurgi; that defendants Leone Bosurgi (sued by plaintiff herein as Leon Bosurgi) and/or Emilio Bosurgi (sued by plaintiff herein as Emilo Bosurgi) instructed defendant Chemical Bank to sell the securities and deposit the proceeds allegedly belonging to the Estate of Adriana Bosurgi in an account in the name of defendants Leone Bosurgi and Emilio Bosurgi; that, as provided by law, on March 2, 1971, a delegate of the Secretary of the Treasury of the United States made a jeopardy assessment arising out of the alleged estate tax liability of the Estate of Adriana Bosurgi, deceased, against defendant Chemical Bank as an alleged Statutory Executor of the Estate of Adriana Bosurgi in the amount of $403,988.78 in estate

tax, $100,997.20 in penalty and $161,794.74 in interest, the total being $666,780.72, plus interest as provided by law; and that notice of the aforesaid assessment and demand for the payment thereof was made by the Secretary or his delegate on March 2, 1971.

28. By reason of the wrongful conduct of defendants Leone Bosurgi and Emilio Bosurgi referred to in paragraphs 24 and 25 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 26 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A THIRD CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

29. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 27 hereof as if fully set forth herein.

30. Defendants Leone Bosurgi and Emilio Bosurgi well knew when Leone Bosurgi gave the instructions referred to in paragraph 24 hereof that Adriana Bosurgi had earlier died.

31. In purporting to act pursuant to the power of attorney referred to in paragraph 23 hereof without

disclosing the antecedent death of Adriana Bosurgi, Leone Bosurgi, acting in concert with Emilio Bosurgi, committed fraud and deceit upon defendant Chemical Bank's predecessor.

32. By reason of the wrongful conduct of defendants Leone Bosurgi and Emilio Bosurgi referred to in paragraphs 24, 25, 30 and 31 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 26 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FOURTH CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

33. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 27 and 30 hereof as if fully set forth herein.

34. If the securities in the account referred to in paragraph 22 hereof were the property of Adriana Bosurgi at the time of her death, defendant Leone Bosurgi, in concert with defendant Emilio Bosurgi, acted as an executor of the Estate of Adriana Bosurgi, deceased, in giving the instructions referred to in paragraph 24 hereof.

35. By reason of the wrongful conduct of defendants Leone Bosurgi and Emilio Bosurgi referred to in

paragraphs 24, 25, 30 and 34 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 26 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FIFTH CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, AVERS:

36. Defendant Chemical Bank repeats and reavers the averments of paragraphs 22 through 27 hereof as if fully set forth herein.

37. Having obtained full control, benefit, use and enjoyment of the assets in the account in the name of Adriana Bosurgi, defendants Leone Bosurgi and Emilio Bosurgi are constructive trustees of such assets if such assets were the property of Adriana Bosurgi at the time of her death.

38. In the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

WHEREFORE, defendant Chemical Bank demands:

(1) judgment dismissing the complaint in the above-entitled action as to it with costs;

(2) with respect to its counterclaim and cross-claim for interpleader, that:

(a) the Court enter an order joining the Estate of Adriana Bosurgi, deceased, and Benedict Ginsberg, Esq., as additional parties defendant to the said counterclaim and cross-claim for interpleader;

(b) the Court issue its process for all claimants pursuant to Title 28, U.S.C. § 2361;

(c) the Court require plaintiff, defendants and additional defendants to interplead their respective claims; and

(d) judgment be entered determining (i) the claimant or claimants entitled to the sum of $215,000 herein referred to and (ii) the amount to which each such claimant is entitled;

(3) with respect to its second, third and fourth cross-claims, judgment awarding it damages as against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, for the wrongs therein complained of, with costs;

(4) with respect to its second, third, fourth and fifth cross-claims, that, in the event that plaintiff recovers judgment against defendant Chemical Bank, said defendant recover judgment over and against defendants

Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, with costs; and

(5) such further relief as to the Court may seem just and proper.

May 11, 1971.

CRAVATH, SWAINE & MOORE,

by John W. Barnum
A member of the firm

Attorneys for Defendant-
Third-Party Plaintiff
Chemical Bank,
One Chase Manhattan Plaza,
New York, N. Y. 10005

NOTICE OF MOTION BY BENEDICT GINSBERG, ESQ. DATED APRIL 22, 1971 TO VACATE SERVICE OF THIRD-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CHEMICAL BANK,

71 Civ. 928

Defendant and Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED,

Third-Party Defendants.

- -X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of BENEDICT GINSBERG, sworn to the 22nd day of April, 1971, and the exhibit annexed thereto, the undersigned will move this Court on the 18th day of May, 1971, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in Courtroom 506, United States Courthouse, Foley Square, New York, New York, for an order vacating and setting aside the purported service of the Summons and Third-party complaint of the defendant Chemical Bank upon the Third-Party-Defendants LEONE BOSURGI and EMILIO BOSURGI, on the ground that the said service was made upon a person not authorized to accept service on behalf of the third-party-defendants.

PLEASE TAKE FURTHER NOTICE that answering affidavits if any, shall be served upon the undersigned at least five days before the return date of the motion.

Dated: New York, N.Y.
April 22, 1971

Yours etc.,

BENEDICT GINSBERG
Appearing Specially for
LEONE BOSURGI and EMILIO BOSURGI
Office & P. O. Address
475 Fifth Avenue
New York, N.Y. 10017

TO:

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Defendant and Third Party Plaintiff
1 Chase Manhattan Plaza
New York, N.Y. 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

71 Civ. 928

CHEMICAL BANK,

Defendant and Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED,

Third-Party Defendants.

- X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BENEDICT GINSBERG, being duly sworn, deposes and says.

I am the attorney for LEONE BOSURGI and EMILIO BOSURGI ("THE BOSURGIS"), appearing specially, for the sole purpose of this motion, to vacate the service of process, by the defendant CHEMICAL BANK ("THE BANK"), which process seeks to implead THE BOSURGIS, and to assert a claim-over against them.

The process to which this motion is addressed was served by HOWARD G. KRISTOL, ESQ., an attorney in the employ of counsel for THE BANK, upon your deponent. It is the contention of THE BANK that service of process upon THE BOSURGIS, was properly made by serving

your deponent, pursuant to § 303 of the New York State Civil Practice Law and Rules (CPLR).

The statute provides:

"§ 303. Designation of attorney as agent for service

"The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears, as agent, during the pendency of the action, for service of a summons in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court."

Service of the summons upon your deponent, in lieu of service thereof upon THE BOSURGIS, is not appropriate under the statute, for the reason that the statute does not, assuming it to be otherwise valid, constitute the attorney as forever the agent for the service of any and all process, in any and all actions, which anyone may desire to institute, in any and all courts.

The Court will note that the duration of authority is expressly limited by the statute to "the pendency of the action." The action which THE BOSURGIS institute in the State Court is no longer pending. It was terminated by the execution of a stipulation which not only terminated the action but transferred the subsequent relationship between the parties to that action, from parties to a litigation, to parties to an arbitration agreement. There no longer is a pending action.

THE BANK has not performed the obligation which it undertook

to perform when the State Court action was terminated. It has now been directed to perform that obligation by an order of the United States District Court (Bonsal, J.), which was unanimously affirmed on appeal, off the bench, by the Court of Appeals, on April 21, 1971. There is therefore no action pending.

So that it will be clear beyond doubt that the action had terminated (regardless of the subsequent order of the United States District Court and the affirmance thereof by the Court of Appeals), we attach a copy of the stipulation executed September 15, 1970, from which it is clear that the relationship of the parties, on and after September 15, 1970, is no longer that of plaintiff and defendant in a pending lawsuit, but that of parties to an arbitration agreement where a designated "arbitrator" is authorized to determine all matters in controversy between them.

In the circumstances described above, the attempt of THE BANK to serve the process in question, not upon THE BOSURGIS, but upon their attorney in a long-since terminated action in the State Court (settled September 15, 1970) is an unwarranted and unauthorized attempt to invoke CPLR § 303. The attempted service, made on your deponent on March 23, 1971, should be vacated.

Benedict Ginsberg

Sworn to before me, this
22nd day of April, 1971.

CHARLES E. RAMOS
Notary Public, State of New York
No. 31-8456850
Qualified in New York County
Commission Expires March 30, 1972

STIPULATION ANNEXED TO FOREGOING AFFIDAVIT IS

REPRODUCED IN THIS APPENDIX AT PAGE A-418

OPINION AND ORDER OF THE DISTRICT COURT DATED NOVEMBER 19, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - -

LASKER, D. J.

This is a motion to vacate and set aside the service of defendant Chemical Bank upon third-party defendants, the Bosurgis. Service was effectuated under CPLR § 303, which provides that the commencement of an action in New York by a person not subject to personal jurisdiction constitutes the designation by him of his attorney as agent for service of process "during the pendency of the action." The issue in this case is whether a prior action between the above mentioned parties was still "pending" at the time service here was made on the attorney for the third-party defendants. The motion to vacate is denied, since it appears that the prior action remained pending according to New York law.

Under New York law an action must be terminated or discontinued in a formal manner. See CPLR § 3217(b) and Concourse Super Service Station, Inc. v. Price, 33 Misc.2d 503, 226 N.Y.S.2d 651 (1962), where the court said that an action is still "pending" for the purposes of CPLR § 303 until final judgment is "actually entered." No New York cases have been cited by third-party defendants which hold that an action may be terminated "informally" or implicitly. In this case no such formal stipulation of settlement and discontinuance has been executed. The third-party defendants contend that the prior action was implicitly terminated because both parties stipulated on the record and in open

court that the case had been settled. Actually, it is apparent that the parties contemplated a superseding formal written discontinuance. The stipulation on the record expressly provided in its concluding paragraph for the negotiation of a formal written stipulation which would call for the termination of the action: "Notwithstanding, the parties shall agree upon a formal written stipulation which shall embody all of the terms as hereinbefore set forth in addition to the material to be supplied by each of the parties." The procedure outlined in CPLR § 3217(a)(2) may have been contemplated.

The conduct of the parties subsequent to the stipulation on the record indicates that a further stipulation was deemed necessary by both sides. Several letters were exchanged between counsel in which disputes arose as to the content of the proposed formal stipulation of discontinuance and settlement. And it is highly questionable whether the Bosurgis' attorney exchanged these letters merely to "appease" Chemical's attorney. Thus, while the stipulation on the record clothed the understanding with a certain formality, it did not terminate the litigation between the parties. No final "meeting of the minds" occurred. The situation is analogous to that of contracting parties who have negotiated the fundamental terms of their agreement but have not drafted and signed a final instrument.

While New York decisions, which are controlling, do not cover the precise facts of this case, such cases as have been decided support Chemical's position. In Yonkers Fire Dressing Co. v. Royal Insurance Co., 247 N.Y. 435, 444 (1928), the court suggests a distinction between stipulations which actually discontinue the case (and which, when filed, may be enforced only by a new plenary action) and those which do not so discontinue and may be enforced by motion in the original action although the distinction is never formally articulated. Furthermore, the court considered the conduct of the parties and the surrounding circumstances of the settlement in determining whether the settlement negotiations were a "mere arrangement between counsel during the pendency of the case..." (at page 444) or the "termination of the litigations, marking a fresh start by the plaintiff from a new coign of vantage." (at page 444).

For the reasons stated above we find that the litigation entitled "Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co. [Index No. 7939 (1966)]" was pending in New York Supreme Court at the time of service of process upon the attorney for the third party defendants herein. Accordingly, the motion to vacate and set aside that service is denied.

It is so ordered.

Dated: New York, N. Y.
November 10, 1971

U.S.D.J.

CERTIFICATE OF MAILING SUMMONS AND COMPLAINT

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEON BOSURGI and EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED; AND LEON BOSURGI AND EMILO BOSURGI,

Defendants.

A 68

71 Civ. 928

CERTIFICATE OF MAILING

I, JOHN LIVINGSTON, Clerk of the United States District Court for the Southern District of New York, do hereby certify that on the 9th day of June, 1971, I served the complaint and summons filed and issued herein on the 2nd day of March, 1971, by mailing by registered mail, return receipt requested, at the United States Post Office, Church Street Station, New York, N.Y., a copy of each thereof, securely enclosed in a postpaid wrapper, addressed to:

Leon Bosurgi
Villagio Pace
Via Consolare Pompea, 33
Messina, Italy

Sept 301877

Emilio Bosurgi
Villagio Pace
Via Consolare Pompea, 29
Messina, Italy

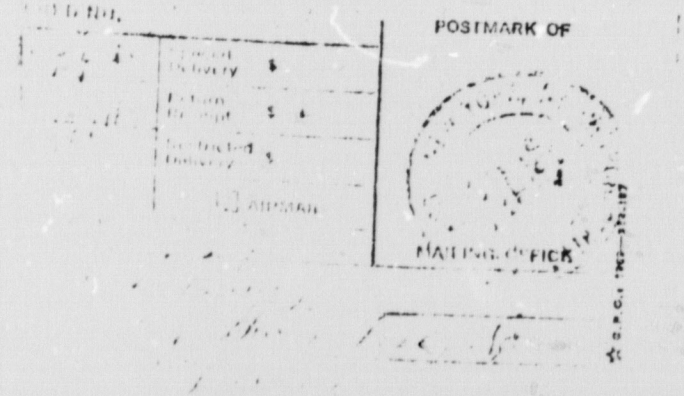
Ref No. 301876

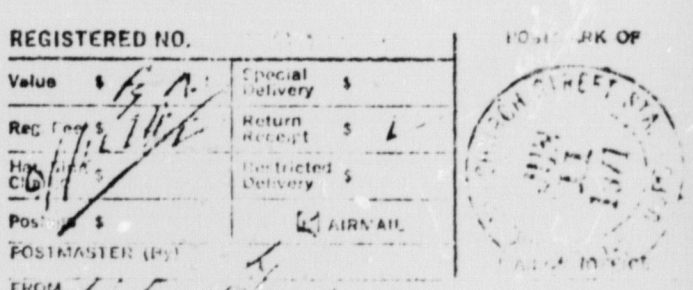
and that annexed to the original hereof is registered mail receipt No. [illegible] (Church Street Station) which was issued at my request as aforementioned.

Dated: New York, N.Y.,
June 10, 1971.

CLERK

A 69


POSTMARK OF
MAILING OFFICE


REGISTERED NO.
Value $
Special Delivery $
Return Receipt $
Restricted Delivery $
AIRMAIL
POSTMASTER (By)
FROM

NOTICE OF MOTION BY THE UNITED STATES DATED NOVEMBER 3,1971 TO FILE AMENDED COMPLAINT

A 70

MIS:eb
71-0572

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 11-4-71
S.D. of NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

-v-

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; and CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; and LEON BOSURGI and EMILO BOSURGI,

Defendants.

- x

NOTICE OF MOTION

71 Civ. 928

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Michael I. Saltzman, Assistant United States Attorney, and the proposed Amended Complaint annexed hereto, the undersigned will move this Court, in Room 506, United States Courthouse, Foley Square, New York, New York, on the 16th day of November, 1971, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 15(a), 19 and 20 of the Federal Rules of Civil Procedure, permitting the United States to file its amended complaint adding two additional parties, and to serve the defendants named in the said amended complaint.

Dated: New York, New York
November 3, 1971

WHITNEY NORTH SEYMOUR, JR.
United States Attorney, for the
Southern District of New York,
Attorney for Plaintiff
By:

MICHAEL I. SALTZMAN
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: 264-6321

MLS:ob
71-0572

A 71

To:

JOHN A. LUCIDO, ESQ.
Cravath, Swaine & Moore
1 Chase Manhattan Plaza
New York, New York 10005

A 72

MIS:eb
71-0572

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY
MICHAEL I. SALTZMAN

(15)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; and CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; and LEON BOSURGI and EMILO BOSURGI,

Defendants.

AFFIDAVIT

71 Civ. 928

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL I. SALTZMAN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and as such am in charge of the captioned action.

2. This is a motion of the United States of America seeking an order permitting it to amend its complaint by adding two additional parties, pursuant to the provisions of Rules 15(a), 19 and 20 of the Federal Rules of Civil Procedure.

3. The action was commenced by the filing of the original complaint herein and seeks to collect estate

taxes and to foreclose liens for estate taxes on a sum of money in the amount of $215,000.

4. The complaint in the action was filed on March 2, 1971. Service was made on the defendants; however, only the defendant Chemical Bank has answered the complaint.

5. The estate taxes which the United States seeks to collect in this action arose out of the death of Adriana Bosurgi, a nonresident alien, on a date when, on information and belief, she possessed securities on deposit at the Chemical Bank, in New York, New York.

6. After the death of their mother, Adriana Bosurgi, the defendants Leon and Emilo Bosurgi transferred assets out of the account maintained by their mother into an account in their own names. Thereafter, the brothers Bosurgi instituted a civil action against Chemical Bank in the Supreme Court, New York County, Index No. 7939-66, in connection with certain advice the Bank allegedly gave to them with respect to the funds in the account in their names.

7. The state court action instituted by the brothers Bosurgi against the Bank was settled, with the Chemical Bank agreeing to pay the brothers the sum of $215,000. This sum is now being held in escrow by Benedict Ginsberg, the attorney for the brothers Bosurgi in the state court action, pending an order of this Court.

MIS:eb
71-0572

8. On information and belief, there are two claimants to the fund of $215,000 in addition to the United States.

a. Sociedad Anonima de Inversions Commerciales e Industriales claims to be the true owner of the securities which were in the account in the name of Adriana Bosurgi.

b. Benedict Ginsberg claims to be entitled to attorney's fees in connection with handling the action maintained by the brothers Bosurgi against Chemical Bank.

9. The joinder of both Sociedad and Benedict Ginsberg will not deprive this Court of subject matter jurisdiction, and will allow complete relief to be accorded among those who are already parties to the action.

10. Counsel for the defendant Chemical Bank, the only party who has answered the complaint herein, have authorized me to state that they have no objection to the granting of this motion.

WHEREFORE, the Government prays that this Court permit the movant to file the amended complaint attached hereto.

MICHAEL I. SALTZMAN
Assistant United States Attorney

Sworn to before me this

day of November, 1971

[illegible] BRANNON
[illegible] State of New York
24-0394600
[illegible] Kings County
[illegible] New York County
[illegible] March 30, 1972

AMENDED COMPLAINT ANNEXED TO FOREGOING AFFIDAVIT

IS REPRODUCED IN THIS APPENDIX AT PAGE A-78

MIS:msf
71-0572

ORDER OF THE DISTRICT COURT DATED NOVEMBER 29, 1971
GRANTING MOTION BY THE UNITED STATES TO FILE AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LEON BOSURGI and EMILIO BOSURGI, Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al.,

Defendants.

ORDER

71 Civ. 928

WHEREAS, plaintiff's motion to amend its complaint by adding Sociedad Anonima de Inversiones Comerciales e Industriales and Benedict Ginsberg as parties defendant having come to be heard before the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, and on the papers submitted and no objection having been raised, it is hereby

ORDERED, that the plaintiff file its amended complaint with the Court, and it is further

ORDERED, that a summons and complaint be served upon the defendants heretofore named and also Sociedad Anonima de Inversiones Comerciales e Industriales and Benedict Ginsberg in accordance with the Federal Rules of Civil Procedure.

Dated: New York, New York
November 29th, 1971

/s/ Dudley B. Bonsal
U. S. D. J.

USA-33s-304 SUMMONS

A 77

MIS:eb
71-0572

AMENDED SUMMONS AND COMPLAINT FILED DECEMBER 1, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

Amended SUMMONS

Plaintiff, : Civil Action

-v- : 71 Civ. 928

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

Defendants :

- -x

TO THE ABOVE-NAMED DEFENDANT :

You are hereby summoned and required to serve upon WHITNEY NORTH SEYMOUR, JR. , United States Attorney for the Southern District of New York, plaintiff's attorney whose address is United States Court House, Foley Square, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[redacted] LIVINGSTON
Clerk of Court

Deputy Clerk

(Seal of the U.S. District Court)

Dated: DEC 1 1971

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

MIS:eb
71-0572

A 78

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 12-1-71
S.D. of NEW YORK

- - - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

- v -

: AMENDED COMPLAINT
71 Civ. 928

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

Defendants.

- x

Plaintiff, United States of America, by its attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, for its amended complaint herein, alleges as follows:

1. This is a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of this Court.

2. This action is commenced pursuant to Sections 7401, 7403 and 7404 of the Internal Revenue Code of 1954, at the direction of the Attorney General of the United States, with the authorization and direction and at the request of the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury of the United States.

3. This Court has jurisdiction of this action under 28 U.S. Code, Sections 1340 and 1345, and under Section 7402(a) of the Internal Revenue Code of 1954.

4. On information and belief, Adriana Bosurgi, a nonresident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at the defendant Chemical Bank (hereinafter the Bank). No nonresident estate tax return was filed by or on behalf of the estate.

5. On information and belief, defendants Leone Bosurgi and/or Emilio Bosurgi instructed the Bank to sell the securities and deposit the proceeds belonging to the Estate of Adriana Bosurgi to an account in the names of Leone Bosurgi and Emilio Bosurgi.

6. On information and belief, the defendants Leone Bosurgi and Emilio Bosurgi, instituted an action against the Bank in the Supreme Court, New York County, Index No. 7933-66, in connection with certain advice the Bank gave to Leone Bosurgi and Emilio Bosurgi with respect to the funds in their account at the Bank and pursuant to a settlement of this action, the Bank will pay to the defendants Leone Bosurgi and Emilio Bosurgi the sum of $215,000.

7. As provided for by law, on March 2, 1971, a delegate of the Secretary of the Treasury of the United States made four jeopardy assessments arising out of the estate tax liability of the Estate of Adriana Bosurgi,

deceased, as follows: First, an assessment against Leone Bosurgi and Emilio Bosurgi, as Executors of the Estate of Adriana Bosurgi; second, against Chemical Bank, as Statutory Executor of the Estate of Adriana Bosurgi; third, against Leone Bosurgi, as transferee of assets of the Estate of Adriana Bosurgi; and fourth, against Emilio Bosurgi, as transferee of assets of the Estate of Adriana Bosurgi, each assessment being in the amount of $403,988.78 in estate tax, $100,997.20 in penalty, and $161,794.74 in interest; and the total of each assessment being $666,780.72, plus interest as provided by law. Notice of the aforementioned assessments and demand for the payment thereof was made by the Secretary or his delegate on March 2, 1971, but there is still due and owing the assessed amount plus interest as provided by law.

3. On information and belief, the transfer of the amount to be paid by the Bank to the defendants Leone Bosurgi and Emilio Bosurgi, pursuant to their settlement of the civil action in the Supreme Court, New York County, herein described, will jeopardize the collection of estate taxes due and owing to the plaintiff, United States of America.

MFS:eb

9. On information and belief, Sociedad Anonima de Inversions Commerciales e Industriales (hereinafter referred to as Sociedad) may have or may claim to have an interest in the settlement fund described in paragraph "6" of the complaint herein.

10. On information and belief, Sociedad, by its attorneys, Cainsburg, Gottlieb, Levitan & Cole, 122 East 42nd Street, New York, New York, has instituted a civil action in the New York Supreme Court, County of New York, Index #12140/71, claiming title to the said fund.

11. On information and belief, Sociedad claims that the securities on deposit in the security account in the name of Adriana Bosurgi, at the defendant Chemical Bank, belonged in fact to it and not to Adriana Bosurgi, and thus that Sociedad and not the defendants Leone and Emilio Bosurgi is entitled to the settlement fund of $215,000.

12. The defendant Benedict Ginsberg has offices at 475 Fifth Avenue, New York, New York.

13. On information and belief, the defendant Benedict Ginsberg is the attorney for the defendants Leone and Emilio Bosurgi in their civil action against the defendant Chemical Bank, described in paragraph "6" of the complaint herein and may have or may claim to have an interest in the settlement fund for attorney's fees.

WHEREFORE, the United States of America, plaintiff herein, prays as follows:

(1) That this Court issue a preliminary injunction restraining any payment by the Bank to the defendants Leone Bosurgi and Emilio Bosurgi, and further proceedings by the said defendants in the state court action herein described;

(2) That this Court adjudge and decree that the defendants are indebted to the United States of America in the sum of $666,730.72, plus interest, as provided by law;

(3) That this Court adjudge and decree that the United States of America has valid and subsisting liens for its tax claims;

(4) That this Court foreclose the liens of the United States of America against the amount the Bank will pay the defendants Leone Bosurgi and Emilio Bosurgi under the settlement of a civil action in the Supreme Court, New York County, Index No. 7939-66;

(5) That this Court order the Bank to deposit any money to be paid under its settlement with the defendants Leone Bosurgi and Emilio Bosurgi in an interest-bearing account pending a determination of the United States of America's claims; and

(6) That this Court grant such other and different relief as seems just and proper under the circumstances, including the costs of the plaintiff herein.

A 83

Dated: New York, New York

November , 1971

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff

By:

MICHAEL J. GARMAN
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: 264-6321

PROOF OF SERVICE OF SUMMONS AND AMENDED COMPLAINT ON EMILIO BOSURGI DATED DECEMBER 7, 1971

A - 84

(21)

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: UNITED STATES OF AMERICA

COURT NUMBER: 71 Civ. 928

DEFENDANT(S): LEONE BOSURGI, et al.

TYPE OF WRIT: AMENDED COMPLAINT

SERVE / AT — NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: EMILIO BOSURGI

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code):

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

MICHAEL I. SALTZMAN
Assistant U. S. Attorney
United States Courthouse
Foley Square
New York, New York 10007

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 4 OF TOTAL 5

CHECK IF APPLICABLE

☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

Please serve:
Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: [signature]

TELEPHONE NUMBER: 264-6321

DATE: 11/30/71

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted. Acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.

DEPOSIT/CODE: (1)

DIST. OF ORIGIN: 2-7

DISTRICT TO SERVE: 2-7

LOCATION OF SUB-OFFICE OF DIST. TO SERVE:

SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK:

DATE: 12/2/71

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above):

☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above):

FEE (If applicable): $

MILEAGE: $

DATE OF DELIVERY OR LEVY (Use Remarks if necessary):

DATE OF SERVICE:

TIME: 12 AM/PM

SIGNATURE OF U.S. MARSHAL OR DEPUTY: [signature]

REMARKS:

USM 285 (Ed. 7-1-70)

3. NOTICE OF SERVICE

PROOF OF SERVICE OF SUMMONS AND AMENDED COMPLAINT ON LEONE BOSURGI DATED DECEMBER 7,1971

A 85

(22)

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: UNITED STATES OF AMERICA

COURT NUMBER: 71 Civ. 928

DEFENDANT: LEONE BOSURGI, et al.

TYPE OF WRIT: Summons, Amended Complaint

SERVE: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN

LEONE BOSURGI

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)

AT

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW

HERBERT I. SALTZMAN
Assistant U. S. Attorney
United States Courthouse
Foley Square
New York, New York 10007

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 2 OF TOTAL 5

CHECK IF APPLICABLE

☐ One copy for U.S. Attorney or designee and two copies for Attorney General of the U.S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

Please serve:
Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: [signature]

TELEPHONE NUMBER: 264-6321

DATE: 11/30/71

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (if applicable) and sign USM-285 for first writ only if more than one writ submitted.

DEPOSIT/CODE: 6

DIST. OF ORIGIN: 57

DISTRICT TO SERVE: 57

LOCATION OF SUB OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.

SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: [signature]

DATE: 12/3/71

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS", the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above)

☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)

FEE (If applicable): $ 3

MILEAGE: $

DATE OF SERVICE: 12/7/71

TIME: 4:00 PM

SIGNATURE OF U.S. MARSHAL OR DEPUTY: [signature]

REMARKS (Use Remarks if necessary)

FEE DUE:

USM-285 (Ed. 7-1-70)

3. NOTICE OF SERVICE

PROOF OF SERVICE OF SUMMONS AND AMENDED COMPLAINT ON BENEDICT GINSBERG, ESQ. DATED 12/7/71

A 86

(23)

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (*No. 5*) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: UNITED STATES OF AMERICA

COURT NUMBER: 71 Civ. 920

DEFENDANT: [illegible] BURGI, et al.

TYPE OF WRIT: AMENDED COMPLAINT

SERVE / AT

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: BENEDICT GINSBERG, ESQ.

ADDRESS (*Street or RFD, Apartment No., City, State and ZIP Code*): 475 Fifth Avenue, New York, New York 10017

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Michael J. Seltzman
Assistant U. S. Attorney
Room 324
United States Courthouse
Foley Square, New York, N.Y.

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 3 TOTAL 5

CHECK IF APPLICABLE:
☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR requesting service on behalf of: [signature]

TELEPHONE NUMBER: 264-6321

DATE: 11/30/71

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (*or applicable code*) and sign USM-285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
	[illegible]	57	57	

I acknowledge receipt for the total number of writs indicated and for the deposit (*if applicable*) shown	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK	DATE
		12/3/71

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (*If not shown above*)

☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (*Complete only if different than shown above*)

FEE (*If applicable*): $ [illegible]

MILEAGE: $ [illegible]

DATE(S) OF ENDEAVOR (*Use Remarks if necessary*)	DATE OF SERVICE	TIME	SIGNATURE OF U. S. MARSHAL OR DEPUTY
	12/7/71	AM PM	[signature]

REMARKS

USM-285 (Ed. 7-1-70)

3. NOTICE OF SERVICE

PROOF OF SERVICE OF SUMMONS AND AMENDED COMPLAINT ON SAICI DATED DECEMBER 7,1971

A - 87

(24)

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (*No. 5*) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: UNITED STATES OF AMERICA — COURT NUMBER: 71 Civ. 935

DEFENDANTS: LIONEL BOSUSCI, et al. — TYPE OF WRIT: AMENDED COMPLAINT

SERVE — NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN:
SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES

AT — ADDRESS (*Street or RFD, Apartment No., City, State and ZIP Code*)

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

MICHAEL I. SALTZMAN
Assistant U. S. Attorney
United States Courthouse
Foley Square
New York, New York 10007

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. — NO. 1 OF TOTAL 5

CHECK IF APPLICABLE:
☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS

Please serve -
SAMUEL GOTTLIEB, ESQ.
Gainsburg, Gottlieb, Levitan & Cole
122 East 42nd Street
New York, New York

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR — TELEPHONE NUMBER: 262-6321 — DATE: 11/30/71

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (*or applicable code*) and sign USM-285 for first writ only if more than one writ submitted.
Acknowledge receipt for the total number of writs indicated and for the deposit (*if applicable*) shown.

DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
5	57	54	

SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK — DATE: 12/3/71

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (*If not shown above*) — ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode

ADDRESS (*Complete only if different than shown above*)

DATE(S) OF ENDEAVOR (*See Remarks if necessary*)	DATE OF SERVICE	TIME	AM/PM	SIGNATURE OF U.S. MARSHAL OR DEPUTY	FEE (*If applicable*)	MILEAGE
	12/3/71	1'			$	$

REMARKS

Copy Received
[illegible]
12/3/71
Gainsburg, Gottlieb, Levitan & Cole
122 E. 42nd St.
New York, N.Y.

37

USM 285 (Rev. 7-1-70) — **3. NOTICE OF SERVICE**

A 88

NOTICE OF MOTION BY GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS. DATED DECEMBER 22, 1971 TO VACATE SERVICE OF SUMMONS & AMENDED COMPLAINT ON THEM AS AGENTS OF SAICI

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - ENTERED IN OFFICE-DIARY 12/23/71

UNITED STATES OF AMERICA, DATE DUE Jan 11 - 1972

Plaintiff,

- against -

NOTICE OF MOTION

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Andriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

Civil Action 71 Civ. 928

Defendants.

- x

PLEASE TAKE NOTICE, that upon the annexed affidavit of SAMUEL GOTTLIEB, ESQ. sworn to the 22nd day of December 1971, together with the exhibits annexed thereto, the undersigned will move this Court at a Motion Term thereof to be held on the 11th day of January, 1972, at the United States Courthouse, Foley Square, in the City, County and State of New York, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, vacating and setting aside

the purported service of the amended summons and complaint of the plaintiff, United States of America, upon defendant Sociedad Anonima de Inversions Commerciales e Industriales, on the grounds that said service was not made upon a person authorized to accept service on behalf of said defendant and for such other and further relief as to this Court may seem just and proper.

Dated, New York, N.Y.
December 22, 1971.

Yours, etc.

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys appearing specially for
Defendant Sociedad Anonima de
Inversions Commerciales e Industriales
Office and Post Office Address:
122 East 42nd Street
New York, N.Y. 10017

Tel.: (212) 697 -3440

TO:

BENEDICT GINSBERG, ESQ.
Attorney for Defendants
Leone and Emilio Bosurgi
475 Fifth Avenue
New York, New York 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, New York 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, New York 10005

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff, : AFFIDAVIT

Civil Action
71 Civ. 928

- against -

:

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of : Adriana Bosurgi, Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES and : BENEDICT GINSBERG,

Defendants.

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SAMUEL GOTTLIEB, being duly sworn, deposes and says:

I am a member of the firm of Gainsburg, Gottlieb, Levitan & Cole, attorneys for defendant above named, Sociedad Anonima de Inversions Commerciales e Industriales [SAICI] appearing specially herein, and make this affidavit in support of this motion to vacate and set aside service of process herein against said defendant.

SAICI, as I have been advised, is a company organized and existing under and pursuant to the laws of Uruguay, with its office in Montevideo. Plaintiff's amended summons and amended complaint, copies of which are annexed hereto as Exhibit 1, have been amended so as to add SAICI and Benedict Ginsberg, Esq., as party-defendants to this action, pursuant to leave granted by order of Judge BONSAL dated November 29, 1971, which directed "that a summons and complaint be served upon the defendants heretofore named and also Sociedad Anonima de Inversiones Comerciales e Industriales and Benedict Ginsberg, in accordance with the Federal Rules of Civil Procedure." A copy of said order is annexed hereto as Exhibit "2". The said process and complaint were served on deponent at his office on December 7, 1971.

My firm are attorneys for SAICI in an action entitled "Sociedad Anonima de Inversiones Comerciales e Industriales, plaintiff, against Leone Bosurgi, Emilio Bosurgi and Benedict Ginsberg, Defendants," commenced in June 1971 in the Supreme Court New York County, Index No. 22140/71. A copy of SAICI's complaint therein is annexed as Exhibit "3". Said action is predicated upon a trust alleged to have been long ago established in writing between SAICI and Adriana Bosurgi and her sons, Emilio Bosurgi and Leone Bosurgi, which said parties as trustees of SAICI's property and funds,

deposited in an account in their names at the Chemical Bank of New York. A decree is sought adjudging that a $215,000. fund, evidenced by certificates of deposit, presently held in escrow by Benedict Ginsberg, Esq., as the result of the settlement of a lawsuit commenced by Leone Bosurgi and Emilio Bosurgi against the Chemical Bank in Supreme Court New York County, Index No. 7939/66, represents the proceeds of:

> " * * * funds which had been held by the parties to said lawsuit in 'fiduciary administration' for and on behalf of plaintiff [SAICI]"

and that

> "the amounts paid in settlement of said claim is the property of and accountable to plaintiff [SAICI]."

Relief is demanded that said escrowee pay said escrow fund and any increments thereto, to plaintiff SAICI. The United States is not a party to said lawsuit.

The instant action brought by the United States "to foreclose certain tax liens of the United States against certain property within the jurisdiction of this Court" (pltf.'s complaint, par. 1) essentially seeks to foreclose a claimed lien for estate taxes on the said escrow fund, alleging that the same is the proceeds of property of Adriana Bosurgi at the time of her death.

Plaintiff herein has attempted to effectuate service of its amended process in this action by serving me, presumably "as agent" for SAICI, because of the pendency of said action in the Supreme Court New York County and since my firm are attorneys for SAICI therein. Said service apparently is sought to be justified under the provisions of New York Civil Practice Law and Rules Section 303, presumably because I am not now nor have I ever been an officer, managing or general agent, or any agent otherwise authorized by appointment or by law to receive service of process for SAICI, as specified in Rule 4 of the Federal Rules of Civil Procedure. I repeat, I am not a member of SAICI and have no power nor am I authorized to accept process in SAICI's behalf.

New York CPLR Section 303 provides:

> "The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears, as agent, during the pendency of the action, for service of a summons in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court."
> (Emphasis supplied)

Unquestionably, the Government is not a party to the aforesaid action commenced by SAICI in the Supreme Court New York County and I am, therefore, not such a statutory "agent" for service of process within the meaning of the aforesaid provision and service upon me as service upon SAICI is patently improper.

Regrettably, the service of process upon SAICI sought to be effectuated in this action, only adds to the "procedural thicket" which I have endeavored to cut through, as is reflected in my letter of November 24, 1971, written to Michael I. Saltzman, Esq., Assistant United States Attorney, and from which the following quotations are taken; for the purpose of clarity it is to be borne in mind that settlement proceedings in the aforesaid action against the Chemical Bank were had before Mr. Justice KAPELMAN in the New York State Supreme Court and have not been finally concluded:

> "It is, of course, unnecessary to haggle about the applicability of Vernitron [440 F.2d 105; 2 Cir.] at this time. Your letter concludes by accepting our offer to meet in order to cut through the "procedural thicket" which has grown up in this matter and I will endeavor immediately to arrange for such a meeting. I feel again compelled to assure you, as I did in my letter of November 5, 1971 to Mr. Justice Silverman, in which I stated:
>
> > 'I enclose a copy of my letter of even date herewith addressed to Michael I. Saltzman, Esq., Assistant United States Attorney for the Southern District of New York, which is being delivered by hand to all counsel in this matter and Mr. Justice Kapelman setting forth why, in the present

posture of this matter, we consider it an absolute necessity, not a matter of choice between three such eminent and respected Judges as yourself, Mr. Justice Kapelman and Judge Bonsal, to request that the matter be referred to Mr. Justice Kapelman for determination.'

I must confess that I am still at a loss to know how the matter in the present posture before Judge Kapelman can be removed to the Federal Court. My letter of June 24, 1971 indicates in specific detail that every effort was made by this office and by me, personally, to resolve these complexities of venue and jurisdiction. That communication refers to the talk you and I had as far back as June 16, 1971, in which you asked that I send you a copy of the summons and complaint and our proposed order of attachment, the affidavits and exhibits in the lawsuit begun by this office. We all met before Mr. Justice Kapelman on June 23, 1971 and I am certain that you and all counsel for the respective parties here involved who were then present, will recall that I vainly sought then to obtain some accord or stipulation in order to have the matter of title and all other issues disposed of in one forum. My letter of June 24, 1971, sent the day after that conference, made it clear that our position was that 'unless the issue raised as to title of these funds is initially and promptly determined, we contend there will exist no valid or legal basis for Mr. Justice Kapelman to make a complete and final determination of this matter;' and I stated that '[o]ur request for a consent to consolidation or, in the alternative, for a concurrent consideration of the issue raised as to title' was 'designed to enable the most expeditious disposition of the determination of the conflicting rights.' Moreover, it was I who challenged the validity of the stipulation made by counsel for the Chemical Bank and by Benedict Ginsberg, Esq., which designated that Mr. Justice Kapelman act 'as an arbitrator'. It was I who suggested, in the furtherance of expedition, that Mr. Justice Kapelman dispose of the issue as to legal fees 'in quick and summary fashion, either by conventional hearing or by Simplified Procedure.' My letter concludes with the

urgent plea 'that this office be immediately advised as to whether the requested consent for consolidation or for a concurrent hearing on the issue of title in the pending proceedings will be forthcoming;' and '[i]f not, I propose to move for appropriate relief to that end.'

In the ensuing months nothing was heard by me in response to the foregoing.

* * *

The foregoing necessarily leads me to the statement in your letter of November 19, 1971, that you 'have information that the Society [plaintiff] is owned or controlled by the estate of Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi' and 'It is not surprising, therefore, that Leone and Emilio Bosurgi would agree to the claim made by the Society, i.e. themselves' and, accordingly, you oppose court jurisdiction upon the basis that 'any action it might take in rendering a judgment in favor of the Society and in derogation of the rights of the Government would be voidable because of the identity of the parties.'

I am certain it was not your purpose to accuse, or even suggest that this office was engaged in a dubious strategy to thwart the Government by suppression or concealment of any proprietary or stockholder interest on the part of the Bosurgis in the plaintiff Society. Here, too, it is unnecessary to argue what the effect would be upon the taxable liability claimed by the Government if Leone and Emilio Bosurgi, as well as the decedent Adriana Bosurgi, against whose estate, estate taxes solely are asserted, had a proprietary or stockholders interest in plaintiff Society. This office, before bringing the present action, was naturally interested in the same factor. I am enclosing, herewith, a photostat of a document in our possession in Spanish, signed by Juan Alberto Etcheverrito, Public Accountant, attested before a Notary Public, with a translation thereof certified by the American Vice Consul of Montevideo, Uruguay, in which it is stated that:

'a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial investments corporation), b) That they have not attended any meeting of the society, and c) That they have never occupied any office of director, nor they have discharged any executive office within the society, neither direct or through legal attorneys.'

After receipt of your letter of November 19, 1971, inquiry by this office did not develop anything to the contrary, nor was there anything that suggested that the information received by you is accurate. I, therefore, believe that in the same spirit of candor you will, in turn, submit to me a copy of any document verifying the information given you or let me know the source and nature thereof; so that I, in turn, may promptly check its accuracy. I will readily acknowledge, of course, that the Government has much better facilities and avenues of investigatory approach than this office has and hence I would welcome any advice received as to the authenticity of the information that, as aforesaid, was supplied to us. In the meantime, unless you indicate otherwise, I will endeavor to arrange the suggested meeting of counsel for all of the parties.

Please be good enough to let me hear from you at your reasonable convenience."

The next thing that followed was the attempted service of process herein upon me, which only adds to the procedural trammels, since as aforesaid I have no authority to accept such service of process or to appear in this action. However, I am still willing to sit down with all counsel representing the diverse interests before any court willing to extend its good offices to that end in order to

see what can be done to cut through the "procedural thicket" that has only become more dense.

WHEREFORE, it is respectfully requested that an order be made and entered herein, granting this motion to set aside the service of process attempted to be made upon me on behalf of SAICI.

SAMUEL GOTTLIEB

Sworn to before me this
22nd day of December, 1971

ALAN C. KRIEGER
NOTARY PUBLIC, State of New York
No. 60-2200800
Qualified in Westchester County
Commission Expires March 30, 1973.

AMENDED SUMMONS ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-77

- -

AMENDED COMPLAINT ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-78

- -

SETTLEMENT DATED SEPTEMBER 15, 1970 ANNEXED TO FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-448

ANSWER TO AMENDED COMPLAINT, AMENDED COUNTERCLAIM, AMENDED CROSS-CLAIMS AND AMENDED THIRD PARTY COMPLAINT BY CHEMICAL BANK DATED APRIL 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI AND EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND BENEDICT GINSBERG,

Defendants,

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, AND W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND W. SANDERSON & SONS,

Third-Party Defendants.

71 Civ. 928

ANSWER TO AMENDED COMPLAINT, AMENDED COUNTERCLAIM, AMENDED CROSS-CLAIMS AND AMENDED THIRD PARTY COMPLAINT OF DEFENDANT CHEMICAL BANK

Defendant Chemical Bank, sued herein as an alleged

Statutory Executor of the Estate of Adriana Bosurgi, Deceased, for its answer to the amended complaint:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 1 through 3 thereof, except that (a) this action purports to be a civil action to foreclose certain tax liens of the United States against certain property within the jurisdiction of the Court; (b) the action purports to have been commenced pursuant to the sections of the Internal Revenue Code of 1954 referred to in paragraph 2 of said complaint at the direction of the Attorney General of the United States and with the authorization and direction and at the request of the Commissioner of Internal Revenue; and (c) jurisdiction is purported to arise under the sections of the United States Code and the Internal Revenue Code of 1954 referred to in paragraph 3 of said complaint.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4 thereof except that, as of March 27, 1963, there were held by Chemical Bank New York Trust Company later merged with defendant Chemical Bank pursuant to an agreement of merger effective February 17, 1969 (hereinafter referred to as "defendant Chemical Bank's predecessor"), in a custodian account in the name of Adriana Bosurgi with a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi securities having a value of approximately $1,000,000 as of such date.

3. Denies the averments of paragraph 5 thereof, except that in or about April 1963, defendant Leone Bosurgi

instructed defendant Chemical Bank's predecessor, purportedly pursuant to the aforesaid power of attorney, to sell the securities in the custodian account in the name of Adriana Bosurgi, to close that account and open a new custodian account jointly in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of securities held in the custodian account in the name of Adriana Bosurgi.

4. Denies the averments of paragraph 6 thereof, except that on March 14, 1966, a summons was served on defendant Chemical Bank's predecessor in an action in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Co.; that on May 10, 1966, a complaint was served on defendant Chemical Bank's predecessor in said action; and that on September 15, 1970, an oral stipulation of settlement was made on the record of said Court and respectfully refers the Court to the summons, the complaint and the stipulation on the record in said action for their contents.

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof, except that on or about March 2, 1971, and on or about March 4, 1971, defendant Chemical Bank received four Notices of Levy (Form 668-A), each dated March 2, 1971, and a Statement of Tax Due IRS (Form 17-A) dated March 2, 1971, respectively, and respectfully refers the Court to said Notices and Statement for

their contents.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 8 thereof.

7. Admits the averments of paragraphs 9, 10, 11 and 12 thereof.

8. Denies the averments of paragraph 13 thereof, except that Benedict Ginsberg represents the defendants Leone and Emilio Bosurgi in the action referred to in paragraph 4 hereof, and claims an interest in the settlement fund for attorney's fees.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, AVERS:

9. At the time that defendant Chemical Bank's predecessor received and acted upon the instructions referred to in paragraph 3 hereof, it did not know or have reason to know that Adriana Bosurgi had earlier died.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, AVERS:

10. The jeopardy assessment as to defendant Chemical Bank was and is arbitrary and capricious and in denial of due process of law and is, therefore, without force or effect.

AS AND FOR A COUNTERCLAIM AND CROSS-CLAIM FOR INTERPLEADER AS TO CLAIMANTS UNITED STATES OF AMERICA, LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF, AND AS AGENTS OF, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, BENEDICT GINSBERG, ESQ., SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES AND W. SANDERSON & SONS, AVERS:

11. This is a counterclaim and cross-claim for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure and Title 28, U.S.C. §§ 1335, 2361 and 2410 for a determination of adverse claims to a sum of $215,000 plus accrued interest.

12. The jurisdiction of this Court is founded on Title 28, U.S.C. §§ 1331 and 1340, the interpleaded claims arising under the internal revenue laws of the United States, Title 28, U.S.C. §§ 1332 and 1335, there being the requisite diversity of citizenship among the claimants; and the ancillary and pendent jurisdiction of this Court. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

13. Defendant Chemical Bank is a banking corporation duly organized under the laws of the State of New York with its principal place of business in the State of New York.

14. Defendants Leone Bosurgi and Emilio Bosurgi, sued herein individually, as executors of the Estate of Adriana Bosurgi, deceased, as trustees of a trust for the benefit of defendant Sociedad Anonima de Inversions Commerciales e Industriales (hereinafter referred to as "Sociedad"), as agents of Sociedad and as agents of W. Sanderson & Sons (hereinafter referred to as "Sanderson"), are citizens of Italy and/or Argentina.

15. Additional defendant Estate of Adriana Bosurgi, deceased, is a citizen of Italy.

16. Additional defendant Sanderson is a company organized and existing under and by virtue of the laws of the Republic of Italy with its headquarters in Milan, Italy.

17. Defendant Benedict Ginsberg, Esq., is a citizen of the State of New York.

18. Sociedad is a company organized and existing under and pursuant to the laws of Uruguay, with its principal place of business in Montevideo, Uruguay.

19. In connection with an action pending in the Supreme Court of the State of New York, County of New York, Index No. 7939/66, entitled Leone Bosurgi and Emilio Bosurgi

v. Chemical Bank New York Trust Co., a stipulation of settlement was entered on the record providing for the payment by defendant Chemical Bank to defendants Leone Bosurgi and Emilio Bosurgi, subject to certain conditions, of the sum of $215,000.

20. Pursuant to an order of this Court entered on March 18, 1971, defendant Chemical Bank has paid to defendant Benedict Ginsberg, Esq., the sum of $215,000, to be held by him in custodia legis in the form of certificates of deposit of Chase Manhattan Bank, subject to any and all liens of the United States and subject to any further order which may be made by this Court with regard to the rights of the United States and of any other claimant to said sum of $215,000.

21. Plaintiff claims tax liens with respect to the sum referred to in paragraph 20 hereof as set forth in the amended complaint herein.

22. Defendants Leone Bosurgi and Emilio Bosurgi in their individual capacities, as trustees of a trust for the benefit of Sociedad or as agents of Sociedad claim or may claim that they are the rightful owners of, or that they have an interest in, the sum referred to in paragraph 20 hereof free and clear of any lien or interest of plaintiff.

23. Defendant Sociedad claims that it is the rightful owner of the sum referred to in paragraph 20 hereof, free and clear of any lien or interest of plaintiff.

24. Additional defendant Estate of Adriana Bosurgi, deceased, and defendants Leone Bosurgi and Emilio Bosurgi, as executors of said Estate, may claim an interest in the sum referred to in paragraph 20 hereon on behalf of said Estate, said sum being in settlement of claims against defendant Chemical Bank involving assets which may have been

derived from securities held at defendant Chemical Bank's predecessor in a custodian account in the name of Adriana Bosurgi and which may have been the property of Adriana Bosurgi at the time of her death.

25. Additional defendant Sanderson and defendants Leone Bosurgi and Emilio Bosurgi, as agents of Sanderson, may claim an interest in the sum referred to in paragraph 20 hereof on behalf of Sanderson, said sum being in settlement of claims against defendant Chemical Bank involving assets which may have been derived from securities held at defendant Chemical Bank's predecessor in a custodian account in the name of Adriana Bosurgi and which may have been the property of Sanderson at the time of her death.

26. Defendant Benedict Ginsberg, Esq., claims a right to receive $78,491.32 as attorney's fees in connection with his representation of defendants Leone Bosurgi and Emilio Bosurgi in the action referred to in paragraph 19 hereof from the sum referred to in paragraph 20 hereof, notwithstanding any lien or interest of plaintiff or of any other claimant in said sum.

27. Defendant Chemical Bank may have an interest in the sum referred to in paragraph 20 hereof by reason of the claims asserted against Sociedad, against Leone Bosurgi and Emilio Bosurgi, individually, as constructive trustees, as executors of the Estate of Adriana Bosurgi, deceased, as trustees, and as agents of trustees, of a trust for the benefit of, and as agents for, Sociedad, and as agents for Sanderson, against the Estate of Adriana Bosurgi, deceased, and against Sanderson in paragraphs 28 through 73 hereof.

AS AND FOR A SECOND CROSS-CLAIM AND A FIRST THIRD-PARTY COUNT AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

28. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14 and 15 hereof as if fully set forth herein.

29. The jurisdiction of this Court is founded on Title 28, U.S.C. § 1332, there being an amount in controversy which exceeds $10,000, exclusive of interest and costs, and the requisite diversity of citizenship among the claimants; and the ancillary and pendent jurisdiction of this Court.

30. On or about March 27, 1963, there were held by defendant Chemical Bank's predecessor in a custodian account in the name of Adriana Bosurgi securities having a value of approximately $1,000,000 as of such date.

31. The custodian account referred to in paragraph 30 hereof was subject to a power of attorney in defendants Leone Bosurgi and Emilio Bosurgi.

32. In or about April 1963, Leone Bosurgi, acting in concert with Emilio Bosurgi, purportedly pursuant to the power of attorney referred to in paragraph 31 hereof, but also acting on their own behalf and on behalf of, and in concert with, the Estate of Adriana Bosurgi, deceased, instructed defendant Chemical Bank's predecessor to sell the securities in the account referred to in paragraph 30 hereof, to close that account and open a new custodian account in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of the aforesaid securities.

33. At the time the instructions referred to in paragraph 32 hereof were given to and acted on by defendant Chemical Bank's predecessor, it did not know that Adriana Bosurgi had earlier died and was not advised of her death by defendant Estate of Adriana Bosurgi, deceased, or defendants Leone Bosurgi and Emilio Bosurgi, and said defendants Leone Bosurgi and Emilio Bosurgi thereafter gained and exercised full control, benefit, use and enjoyment of all the assets previously held in the account in the name of Adriana Bosurgi without having paid any federal estate taxes that may have been, or may be, due the United States of America in respect of the estate of Adriana Bosurgi.

34. The Internal Revenue Service of the United States of America has asserted an estate tax claim in the total sum of $666,780.72 against defendant Chemical Bank as an alleged Statutory Executor of the Estate of Adriana Bosurgi, Deceased, has assessed defendant Chemical Bank for such sum and has levied upon certain property alleged to be in defendant Chemical Bank's possession.

35. On or about March 2, 1971, the United States of America commenced the within action in this Court seeking to foreclose certain alleged tax liens against property alleged to be within the jurisdiction of the Court. The amended complaint avers, in substance, that Adriana Bosurgi, a nonresident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at defendant Chemical Bank; that a nonresident estate tax return was not filed by or on behalf of the Estate of Adriana

Bosurgi; that defendants Leone Bosurgi and/or Emilio Bosurgi instructed defendant Chemical Bank to sell the securities and deposit the proceeds allegedly belonging to the Estate of Adriana Bosurgi in an account in the name of defendants Leone Bosurgi and Emilio Bosurgi; that, as provided by law, on March 2, 1971, a delegate of the Secretary of the Treasury of the United States made a jeopardy assessment arising out of the alleged estate tax liability of the Estate of Adriana Bosurgi, deceased, against defendant Chemical Bank as an alleged Statutory Executor of the Estate of Adriana Bosurgi in the amount of $403,988.78 in estate tax, $100,977.20 in penalty and $161,794.74 in interest, the total being $666,780.72, plus interest as provided by law; and that notice of the aforesaid assessment and demand for the payment thereof was made by the Secretary or his delegate on March 2, 1971.

36. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and the Estate of Adriana Bosurgi, deceased, referred to in paragraphs 32 and 33 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, and the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A THIRD CROSS-CLAIM AND A SECOND THIRD-PARTY COUNT AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

37. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13 through 15 and 29 through 35 hereof as if fully set forth herein.

38. At the time that Leone Bosurgi gave the instructions referred to in paragraph 32 hereof, acting in concert with Emilio Bosurgi and with the Estate of Adriana Bosurgi, deceased, he negligently failed to advise the Bank that Adriana Bosurgi had earlier died.

39. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and the Estate of Adriana Bosurgi, deceased, referred to in paragraphs 32, 33 and 38 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, and the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FOURTH CROSS-CLAIM AND A THIRD THIRD-PARTY COUNT AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND THE ESTATE OF ADRIANA BOSURGI, DECEASED, AVERS:

40. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13 through 15 and 29 through 35 hereof as if fully set forth herein.

41. Defendants Leone Bosurgi and Emilio Bosurgi

well knew when Leone Bosurgi gave the instructions referred to in paragraph 32 hereof that Adriana Bosurgi had earlier died.

42. In purporting to act pursuant to the power of attorney referred to in paragraph 31 hereof without disclosing the antecedent death of Adriana Bosurgi, Leone Bosurgi, acting in concert with Emilio Bosurgi and the Estate of Adriana Bosurgi, deceased, committed fraud and deceit upon defendant Chemical Bank's predecessor.

43. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and the Estate of Adriana Bosurgi, deceased, referred to in paragraphs 32, 33, 41 and 42 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action; and, in the event that the United States recovers judgment against defendant Chemical Bank in this action, said defendant is entitled to recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, and the Estate of Adriana Bosurgi, deceased, for the amount of any such judgment.

AS AND FOR A FIFTH CROSS-CLAIM AGAINST DEFENDANTS LEONE BOSURGI AND EMILIO BOSURGI, AVERS:

44. Defendant Chemical Bank repeats and reavers the averments of paragraphs 30 through 35 hereof as if fully set forth herein.

45. Having obtained full control, benefit, use and enjoyment of the assets in the account in the name of Adriana Bosurgi, defendants Leone Bosurgi and Emilio Bosurgi

are constructive trustees of such assets if such assets were the property of Adriana Bosurgi at the time of her death.

46. By reason of the wrongful conduct of defendants Leone Bosurgi and Emilio Bosurgi referred to in paragraphs 32 and 33 hereof, defendant Chemical Bank has been damaged and is entitled to recover from defendants Leone Bosurgi and Emilio Bosurgi the assets being held by them as constructive trustees and judgment awarding it out of such assets its attorneys' fee, costs and expenses of litigation.

AS AND FOR A SIXTH CROSS-CLAIM AND AS A FOURTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF, AND AS AGENTS FOR, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AVERS:

47. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 18, 29, 30 and 31 hereof, as if fully set forth herein.

48. In or about April 1963, Leone Bosurgi, acting in concert with Emilio Bosurgi, purportedly pursuant to the power of attorney referred to in paragraph 31 hereof, but also acting on their own behalf and on behalf of, and in concert with, Sociedad, instructed defendant Chemical Bank's predecessor to sell the securities in the account referred to in paragraph 30 hereof, to close that account and open a new custodian account in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of the aforesaid securities.

49. At the time said instructions referred to in paragraph 48 hereof were given to and acted on by

defendant Chemical Banks' predecessor, it did not know that Adriana Bosurgi had earlier died and was not advised of her death by either defendants Leone Bosurgi, Emilio Bosurgi, or Sociedad.

50. The said account described in paragraphs 30 and 31 hereof consisted of assets held in trust for the benefit of, or held as agents for, Sociedad, and Adriana, Leone and Emilio Bosurgi acted as trustess of that trust, as agents of the trustees of that trust, or as agents of Sociedad, in opening said account and Leone Bosurgi and Emilio Bosurgi acted as such trustees or such agents in their additional acts or omissions described in paragraphs 48 and 49 hereof.

51. Defendant Chemical Bank repeats and reavers the averments of paragraphs 34 and 35, as if fully set forth herein.

52. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and Sociedad referred to in paragraphs 48, 49 and 50 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

AS AND FOR A SEVENTH CROSS-CLAIM AND AS A FIFTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF, AND AS AGENTS FOR, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AVERS:

53. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 18, 29, 30, 31, 34, 35 and 48 hereof, as if fully set forth herein.

54. At the time said instructions referred to in paragraph 48 hereof were given to and acted on by Chemical Bank's predecessor, it did not know that Adriana Bosurgi had earlier died and defendant Leone Bosurgi, acting in concert with Emilio Bosurgi, on their own behalf and as agents or trustees on behalf of Sociedad, negligently failed to advise the Bank that Adriana Bosurgi had earlier died.

55. The said account described in paragraphs 30 and 31 hereof consisted of assets held in trust for the benefit of, or held as agents for, Sociedad, and Adriana, Leone and Emilio Bosurgi acted as trustees of that trust, as agents of the trustees of that trust, or as agents of Sociedad, in opening said account and Leone Bosurgi and Emilio Bosurgi acted as such trustees or as such agents in their additional acts or omissions described in paragraphs 48 and 54 hereof.

56. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and Sociedad referred to in paragraphs 48, 54 and 55 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

AS AND FOR AN EIGHTH CROSS-CLAIM AND AS A SIXTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF, AND AS AGENTS FOR, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AVERS:

57. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 18, 29, 30, 31, 34, 35 and 48 hereof, as if fully set forth herein.

58. Defendants Leone Bosurgi, Emilio Bosurgi and Sociedad well knew when Leone Bosurgi gave the instructions referred to in paragraph 48 hereof that Adriana Bosurgi had earlier died.

59. In purporting to act pursuant to the power of attorney referred to in paragraph 31 hereof without disclosing the antecedent death of Adriana Bosurgi, Leone Bosurgi, acting in concert with Emilio Bosurgi, on their own behalf and as agents or trustees on behalf of Sociedad, committed fraud and deceit upon defendant Chemical Bank's predecessor.

60. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and Sociedad referred to in paragraphs 48, 58 and 59 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

AS AND FOR A NINTH CROSS-CLAIM AND AS A SEVENTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS AGENTS OF W. SANDERSON & SONS, AND W. SANDERSON & SONS, AVERS:

61. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 16, 29 through 31, 34 and 35 hereof, as if fully set forth herein.

62. In or about April 1963, Leone Bosurgi, acting in concert with Emilio Bosurgi, purportedly pursuant to the power of attorney referred to in paragraph 31 hereof, but also acting on their own behalf and as agents on behalf of, and in concert with, Sanderson, instructed defendant Chemical Bank's predecessor to sell the securities in the account referred to in paragraph 30 hereof, to close that

account and open a new custodian account in his own name and in the name of Emilio Bosurgi, and to deposit in such account new securities purchased with the proceeds realized from the sale of the aforesaid securities.

63. At the time the instructions referred to in paragraph 62 hereof were given to and acted on by defendant Chemical Bank's predecessor, it did not know that Adriana Bosurgi had earlier died and was not advised of her death by defendant Sanderson or defendants Leone and Emilio Bosurgi.

64. The said account described in paragraphs 30 and 31 hereof consisted of assets of Sanderson, and Adriana, Leone and Emilio Bosurgi acted as agents of Sanderson in opening said account, and Leone Bosurgi and Emilio Bosurgi acted as such agents in their additional acts or omissions described in paragraphs 62 and 63 hereof.

65. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and Sanderson referred to in paragraphs 62, 63 and 64 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

AS AND FOR A TENTH CROSS-CLAIM AND AS AN EIGHTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS AGENTS OF W. SANDERSON & SONS, AND W. SANDERSON & SONS, AVERS:

66. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 16, 29, 30, 31, 34, 35 and 62 hereof, as if fully set forth herein.

67. At the time said instructions referred to

in paragraph 62 hereof were given to and acted on by Chemical Bank's predecessor, it did not know that Adriana Bosurgi had earlier died and defendant Leone Bosurgi, acting in concert with Emilio Bosurgi, on their own behalf and as agents of Sanderson, negligently failed to advise the Bank that Adriana Bosurgi had earlier died.

68. The said account described in paragraphs 30 and 31 hereof consisted of assets of, and held as agents for, Sanderson, and Adriana, Leone and Emilio Bosurgi acted as agents of Sanderson in opening said account and Leone Bosurgi and Emilio Bosurgi acted as such agents in their additional acts or omissions described in paragraphs 62 and 67 hereof.

69. By reason of the wrongful conduct of defendants Leone Bosurgi, Emilio Bosurgi and Sanderson referred to in paragraphs 62, 67 and 68 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

AS AND FOR AN ELEVENTH CROSS-CLAIM AND AS A NINTH THIRD-PARTY COUNT AGAINST LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY AND AS AGENTS OF W. SANDERSON & SONS, AND W. SANDERSON & SONS, AVERS:

70. Defendant Chemical Bank repeats and reavers the averments of paragraphs 13, 14, 16, 29, 30, 31, 34, 35 and 62 hereof, as if fully set forth herein.

71. Defendants Leone Bosurgi, Emilio Bosurgi and Sanderson well knew when Leone Bosurgi gave the instructions referred to in paragraph 62 hereof that Adriana Bosurgi had earlier died.

72. In purporting to act pursuant to the power of attorney referred to in paragraph 31 hereof without disclosing the antecedent death of Adriana Bosurgi, Leone Bosurgi, acting in concert with Emilio Bosurgi, on their own behalf and as agents of Sanderson, committed fraud and deceit upon defendant Chemical Bank's predecessor.

73. By reason of the wrongful conduct of defendants Leone Bosurgi and Emilio Bosurgi referred to in paragraphs 62, 71 and 72 hereof, defendant Chemical Bank has incurred and will incur substantial damage, including attorneys' fees, in defense of the tax claim of the United States referred to in paragraph 34 hereof and in defense of the within action.

WHEREFORE, defendant Chemical Bank demands:

(1) judgment dismissing the complaint in the above-entitled action as to it with costs;

(2) with respect to its counterclaim and cross-claim for interpleader, that:

(a) the Court enter an order joining the Estate of Adriana Bosurgi, deceased, and W. Sanderson & Sons as additional parties defendant to the said counterclaim and cross-claim for interpleader;

(b) the Court issue appropriate process pursuant to Title 28, U.S.C. § 2361;

(c) the Court require plaintiff, defendants and additional defendants to interplead their respective claims; and

(d) judgment be entered determining (i) the claimant or claimants entitled to the sum of $215,000 plus accrued interest herein referred to and (ii) the amount to which each such claimant is entitled;

(3) with respect to its second, third and fourth cross-claims and its first, second and third third-party counts,

(a) that, in the event plaintiff recovers judgment against defendant Chemical Bank, said defendant recover judgment over and against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, and against the Estate of Adriana Bosurgi, deceased; and

(b) judgment awarding it damages including attorneys' fees, costs and expenses of litigation as against defendants Leone Bosurgi and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, deceased, and the Estate of Adriana Bosurgi, deceased, for the wrongs therein complained of;

(4) with respect to its fifth cross-claim, judgment against defendants Leone Bosurgi and Emilio Bosurgi

(a) directing them to return to defendant Chemical Bank the assets which they hold as constructive trustees; and

(b) awarding said defendant out of such assets its attorneys' fees, costs and expenses of litigation;

(5) with respect to its sixth, seventh and eighth cross-claims and its fourth, fifth and sixth third-party counts,

(a) judgment awarding it damages including attorneys' fees, costs and expenses of litigation as against defendants Leone Bosurgi and Emilio Bosurgi, individually, as trustees for a trust for the benefit of, and as agents for, Sociedad for the wrongs therein complained of;

(b) judgment awarding it damages including attorneys' fees, costs and expenses of litigation as against defendant Sociedad for the wrongs therein complained of; and

(c) judgment awarding it damages including attorneys' fees, costs and expenses of litigation as against defendant Sociedad, as beneficiary, for the wrongs therein complained of, to be paid out of any assets Sociedad may own, possess, claim or hold legal or equitable title to by reason of the trust of which Adriana Bosurgi was, and the defendants Emilio Bosurgi and Leone Bosurgi were or are trustees or agents of the trustees;

(6) with respect to its ninth, tenth and eleventh cross-claims and its seventh, eighth and ninth third-party counts, judgment awarding it damages including attorneys' fees, costs and expenses of litigation as against defendants Leone Bosurgi and Emilio Bosurgi, individually and as agents of Sanderson, and Sanderson for the wrongs therein complained of; and

(7) such further relief as to the Court may seem just and proper.

April 27, 1972.

CRAVATH, SWAINE & MOORE,

by John R. Hupper

A Member of the Firm

Attorneys for Defendant-Third Party Plaintiff Chemical Bank,
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 6-1-72
S.D. of NEW YORK

- x

UNITED STATES OF AMERICA, :

Plaintiff, :

- v - :

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES; and BENEDICT GINSBERG, :

Defendants. :

- x

PARTIAL DEFAULT JUDGMENT IN REM

71 Civ. 928

#72,544

This action having been commenced on the 3rd day of March, 1971, by the filing of a complaint and the issuance of a summons, and thereafter on December 1, 1971, an amended complaint having been filed and an amended summons having issued, and a copy of the said amended summons and amended complaint having been duly served upon the defendants Leone Bosurgi and Emilio Bosurgi on the 7th day of December, 1971, and the said amended summons with proof of such service having been duly filed in the office of the Clerk of this Court on the 17th day of December, 1971, and the said defendants not having appeared, answered, or made any motion with respect to the amended complaint, and the time of the said defendants to appear,

answer, or make any motion with respect to the amended complaint having expired, and the Clerk of this Court having duly entered the default of the defendants, and it further appearing that the sum of $215,000 plus interest, is in the custody of this Court, the said amount being in the form of certificates of deposit held by Benedict Ginsberg, pursuant to the order of this Court dated March 18, 1971, and it further appearing that there is no just reason for delay in the entry of judgment against two but not all of the defendants herein,

NOW, on motion of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

ORDERED and ADJUDGED, that the United States of America, plaintiff, have judgment against the defendants Leone Bosurgi and Emilio Bosurgi, residing in Messina, Italy, at Villagio Pace, Via Consolare Pompea, 33, and Villagio Pace, Via Consolare Pompea, 29, respectively, for the sum of $215,000, together with interest thereon.

SO ORDERED: May 31, 1972 at New York, NY.

John M. Cannella
U.S.D.J.

Judgment entered ~~May~~ June 2, 1972

JOHN LIVINGSTON
Clerk

MIS:eb
71-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMERCIALES e INDUSTRIALES; and BENEDICT GINSBERG,

Defendants.

AFFIDAVIT FOR PARTIAL DEFAULT JUDGMENT IN REM

71 Civ. 928

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL I. SALTZMAN, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, attorney for the plaintiff herein, and as such is in charge of and is familiar with the above-entitled action.

2. That this action was commenced on the 3rd day of March, 1971, by the filing of a complaint and the issuance of a summons. In this action, the plaintiff

seeks to collect estate taxes which were assessed on March 2, 1971, against the defendants Leone and Emilio Bosurgi, as statutory executors and transferees of the estate of their mother, Adriana Bosurgi. Adriana Bosurgi, a nonresident alien on the date of her death, on information and belief, possessed securities on deposit at the Chemical Bank, in New York, New York, and, therefore, her estate became liable for United States estate taxes.

3. That on information and belief, after the death of Adriana Bosurgi, the defendants Leone and Emilio Bosurgi transferred assets out of the account maintained by their mother at the Chemical Bank into an account in their own name. Thereafter, these defendants instituted a civil action against Chemical Bank in the Supreme Court, New York County, Index No. 7939-66, in connection with certain advice the Bank allegedly gave to Leone and Emilio Bosurgi about the investment of the funds in their account.

4. That Benedict Ginsberg, Esq., was the attorney for the defendants Leone and Emilio Bosurgi in the state court action against Chemical Bank.

5. That the state court action instituted by Leone and Emilio Bosurgi against Chemical Bank was settled, with the Chemical Bank agreeing to pay the defendants Leone and Emilio Bosurgi the sum of $215,000.

MIS:eb
71-0572

6. That on or about March 3, 1971, a copy of a Temporary Restraining Order, restraining the transfer of the amount of the settlement between Leone and Emilio Bosurgi and the Chemical Bank, and a copy of the Summons and Complaint in the captioned action were served upon Benedict Ginsberg, Esq., by delivering a copy of the said Temporary Restraining Order and Summons and Complaint to him.

7. That Robert S. Fink, Esq., and Kostelanetz & Ritholz, attorneys-at-law, represent the defendants Leone and Emilio Bosurgi in a Tax Court action which they commenced after the March 2, 1971 assessment, collection of which is sought herein; that on November 17, 1971 and again on November 30, 1971, the United States Marshal attempted to serve Robert S. Fink and/or Kostelanetz & Ritholz, and that neither Robert S. Fink nor Kostelanetz & Ritholz would accept a copy of the said Summons and Complaint.

8. That on the 1st day of December, 1971, an amended complaint was filed and an amended summons was issued in this action and, thereafter, a copy of the said amended summons and amended complaint was duly served on the defendants Leone and Emilio Bosurgi by delivering a copy of the said amended summons and amended complaint to Benedict Ginsberg; and that on the 17th day of December, 1971, the amended summons and amended complaint, together with proof of service, was duly filed in the office of the Clerk of this Court.

MLS:ob
71-0572

9. That the defendants Leone Bosurgi and Emilio Bosurgi have not appeared, answered, or made any motion in this action and the time of the said defendants to appear, answer, or make any motion has expired; and that the said defendants are now in default for failure to appear or plead herein.

10. That the amount shown by the statement attached hereto is justly due and owing, and that no part thereof has been paid, except as appears by the said statement; that the disbursements sought to be taxed have been made in the action or will necessarily be made or incurred therein; and that, upon information and belief, the defendants are not infants or incompetent persons, or in the military service.

WHEREFORE, it is prayed that the Clerk of this Court enter the default of the defendants and enter the annexed partial judgment in rem against the defendants in accordance with the statement attached hereto.

MICHAEL Y. SALTZMAN
Assistant United States Attorney

Sworn to before me this
30 day of May, 1972

:eb
-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,
Plaintiff,

- v -

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES; and BENEDICT GINSBERG,
Defendants.

STATEMENT FOR JUDGMENT IN REM

Relating to defendants Leone Bosurgi and Emilio Bosurgi and a fund in the possession of the Court

- x

Principal amount sued for	$666,780.72*
Payments previously made	0.00
Amount now due	$666,780.72
Fund in Court	$225,557.89**
Total amount of judgment	$225,557.89**

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* Plus interest as provided by law from date of assessment (March 2, 1971).

** Plus interest accruing at the rate of 4-7/8%. Fund in the form of Certificate of Deposit held by Benedict Ginsberg, Esq., pursuant to the order of this Court dated March 18, 1971.

MIS:eb
71-0572

A 129

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDED ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES; and Benedict Ginsberg,

Defendants.

: CERTIFICATE OF ENTRY OF DEFAULT

: 71 Civ. 928

- x

I, JOHN LIVINGSTON, Clerk of the United States District Court for the Southern District of New York, hereby certify that I have this day duly entered default of the defendants Leone Bosurgi and Emilio Bosurgi, for failure to appear or answer.

Dated: New York, New York
May 31, 1972

JOHN LIVINGSTON

JOHN LIVINGSTON,
Clerk

OPINION AND ORDER OF THE DISTRICT COURT DATED JUNE 5, 1972 DENYING MOTION TO VACATE SERVICE OF SUMMONS AND COMPLAINTON SAICI COUNSEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

71 Civil 928

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIETAD ANONIMA de INVERSIONS COMMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

OPINION

Defendants.

- x

WHITNEY NORTH SEYMOUR, JR., ESQ.
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Attorney for United States of America

MICHAEL I. SALTZMAN, ESQ.
Assistant United States Attorney
Of Counsel

GRUNSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
122 East 42nd Street
New York, New York

Attorneys appearing specially for Defendant
Sociedad Anonima de Inversions Commerciales
e Industriales

DANIEL GOTTLIEB, ESQ.
ALAN C. KRIEGER, ESQ.
Of Counsel

BENEDICT GINSBERG, ESQ.
[illegible] Fifth Avenue
New York, New York

Attorney for Defendants
Leone and Emilio Bosurgi

CRAVATH, SWAINE & MOORE, ESQS.
1 Chase Manhattan Plaza
New York, New York

Attorneys for Chemical Bank
New York Trust Company

EDWARD WEINFELD, D. J.

The defendant Sociedad Anonima de Inversions Comerciales e Industriales (SAICI) moves pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to vacate the purported service upon it of the amended summons and complaint; the contention is that the attorney upon whom process was served, though retained to bring a related suit in the state court, was not an "agent authorized by appointment . . . to receive service of process."(1) This action, as well as two pending state court actions, center about a fund of $215,000 and claims thereto made by the various litigants in those actions. It is necessary to a full appreciation of this motion to describe a portion of the procedural maze which has arisen out of these litigations.

On September 15, 1970, Leone and Emilio Dosurgi entered into a stipulation settling their lawsuit then pending in the New York State Supreme Court against the Chemical Bank New York Trust Company for the sum of $21[illegible],000. Under the terms of the settlement, Chemical agreed that the $215,000 [illegible] be paid to Melvin Weinberg, attorney for plaintiffs,

(1) Fed. R. Civ. P. 4(d)(3).

and held by him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the defendant arising out of their [sic] relationship as banker, depository or custodian of the funds of the plaintiffs or their late mother, Adrianna Bosurgi." Thereafter, on March 2, 1971, the United States commenced the present action against the Chemical Bank and the Bosurgis, individually and as executors of the estate of Adriana Bosurgi, seeking to foreclose certain tax liens against property within the jurisdiction of this court, including the fund to be paid by Chemical Bank in settlement of the state court action brought by the Bosurgis. On March 13, 1971, Judge Bonsal denied a motion for preliminary injunction restraining payment of the fund to the Bosurgis, but ordered instead that Chemical Bank pay over to Benedict Ginsberg, attorney for the Bosurgis, the sum of $215,000 for the purchase of certificates of deposit, and that Ginsberg "have and hold the said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to

the said $215,000."[2]

In June 1971, still another claimant to the fund appeared, SAICI, the movant here. Its attorneys then commenced an action in New York State Supreme Court against the Bosurgis and Benedict Ginsberg, claiming that the settlement fund "is the property of and accountable to [SAICI]," and seeking to have Ginsberg pay over the escrow fund to SAICI. Despite the fact that the government already had asserted its tax lien against the fund, the United States was not named as a party in that action. Faced with this added claim to the fund, the United States, on November 29, 1971, obtained an order allowing the filing of an amended complaint, adding as defendants SAICI and Ginsberg, who claimed an interest in the fund for attorneys fees, and directed that the summons and complaint be served "in accordance with the Federal Rules of Civil Procedure." The amended complaint alleges that SAICI "may have or may claim to have an interest in the settlement fund. . . ." The United States caused process to be served on the attorneys[3]

(2) This order was affirmed by the Second Circuit in open court on April 21, 1971.

(3) The service was made upon the senior partner of the firm.

appearing for SAICI in SAICI's state court action seeking to obtain the fund; it is this process SAICI now claims is invalid.

An attorney, solely by reason of his capacity as an attorney, does not thereby become his client's agent authorized by "appointment . . . to receive service of process."(4) Nor is the fact that an attorney represents his client in a completely unrelated litigation sufficient to establish the requisite authority.(5) What is necessary is that it appear that the attorney was authorized, either expressly or impliedly, to receive service of process for his client.(6) And if such agency is to be implied, it must be implied from all the circumstances accompanying the attorney's appointment which indicate the extent of authority

(4) See Ransom v. Brennan, 437 F.2d 513, 518 (5th Cir.), cert. denied, 403 U.S. 904 (1971); United States v. Marple Community Record, Inc., 335 F. Supp. 95, 101 (E.D. Pa. 1971); aff. Stone v. Bank of Commerce, 174 U.S. 412, 421 (1899).

(5) Schulze v. Schulze, 436 F.2d 635, 639 (7th Cir. 1971); Schwarz v. Thomas, 222 F.2d 305, 307-08 (D.C. Cir. 1955).

(6) Christensson v. Hogdal, 199 F.2d 402, 404 n.3 (D.C. Cir. 1952); United States v. Marple Community Record, Inc., 335 F. Supp. 95, 101 (E.D. Pa. 1971).

the client intended to confer.[7]

It is beyond question that SAICI's attorneys were retained to assert the alleged right to, and to obtain possession of, the $215,000.[8] This retainer necessarily required the attorneys to resist the claims to the fund asserted by other parties, including the United States Government. Assertion of process by the attorney in this suit, which involves relative rights to the settlement fund, was a necessary incident of the attorney's effort to establish SAICI's claim to the settlement fund by opposing the claims of the government, as well as those of the other claimants.[9] Litigation with the United States must have

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(7) See United States v. Balanovski, 236 F.2d 298, 303 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957); United States v. Davis, 38 FR.D. 424 (N.D.N.Y. 1965); 2 J. Moore, Federal Practice ¶4.12, at 1048-51 (1970); Wright & Miller, Federal Practice & Procedure: Civil §1097, at 371-72 (1969).

(8) Unlike the situation in the Balanovski and Davis cases, the specific agreement of retainer has not been submitted on this motion and the scope of the attorney's authority must be ascertained solely from the circumstances of the suit he has brought on SAICI's behalf in state court.

(9) See Kane v. USSR, 267 F. Supp. 709, 713 (E.D. Pa. 1967), aff'd, 394 F.2d 131 (3d Cir. 1968) (per curiam); Restatement (Second) of Agency §§ 34, 35 (1958).

been intended as within the scope of the attorney's authority, since to obtain the fund for SAICI, its attorneys would inevitably have to face and overcome the claim of the United States. In June 1971, when SAICI's attorneys brought the state court action, the government had already asserted its lien against the fund. The fund was held in escrow subject to any further order of this court with regard to the United States and any other claimants; and the custodian named by this court was named as a defendant in SAICI's state court suit. In sum, upon the facts here presented, SAICI's attorneys were impliedly authorized to receive service of process on behalf of SAICI, a defendant in this suit, which, insofar as SAICI is here involved, seeks to determine its rights, if any, to the settlement fund — the very object for which they were initially appointed.

It is appropriate to note that in the instant litigation service upon SAICI's attorneys was not only adequate, but probably optimal. As one court noted in similar circumstances:

> "There is no fear . . . that service of the summons and complaint upon [the attorney] would not be brought home to each principal. This is at times a matter of concern in these problems of service of process through claimed authorized agent. [illegible] would bring notice of the lawsuit to [the principals] seems beyond argument and is evident here from the motion itself in their behalf to quash the service. Also, a lawyer endowed with all the authority given as here to act and appear is about the best candidate one could choose to insure notice of a pending lawsuit."(10)

Having concluded that SAICI's attorney was an agent authorized by appointment to receive service of process in this action, it is unnecessary to determine whether service would also have been proper under New York's CPLR, section 303.(11) This court has held that the section may be used by the assignee of a cause of action -- the real

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(10) United States v. Davis, 38 F.R.D. 424, 425-26 (N.D.N.Y. 1965).

(11) The section provides: "The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears, as agent, during the pendency of the action, for service of a summons in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court."

party defendant in the state court action -- when the assignor is the named defendant in the state court action. (12) Here, there has been no assignment and the United States is not a party to the state court action. The custodian of the fund appointed by this court is a named party, and the previous order of this court indicates the continuing interest of the United States in that fund. Whether CPLR section 303 should be extended to cover such a situation is a matter best left to resolution by the New York State courts in an appropriate case.

The motion is denied.

Dated: New York, N. Y.
June 5, 1972

Edward Weinfeld
United States District Judge

(12) See United States v. World Transport, Ltd., 322 F. Supp. 385 (S.D.N.Y. 1971).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71-0572

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and BERNARD GINSBERG,

Defendants,

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, and W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,

Third-Party Defendants.

ANSWER TO CROSS AND THIRD-PARTY CLAIMS

71 Civ. 928

Defendant and third-party defendant Sociedad Anonima de Inversiones Commerciales e Industriales answering the cross and third-party claims herein of defendant and third-party plaintiff, Chemical Bank, upon information and belief, except as otherwise specified:

1. Denies the allegations contained in paragraphs "12," "22," "29," "50," "52," "56," "58," "59" and "60."

2. Denies the allegations contained in paragraph "20," except admits that pursuant to an order of this Court entered on March 18, 1971, defendant Chemical Bank has paid to defendant Benedict Ginsberg, Esq. the sum of $215,000. to be held by him in custodia legis in the form of certificates of deposit of Chase Manhattan Bank and refers to the said order for the terms and provisions thereof.

3. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "24," "25," "27," "31," "48," "49" and "54."

4. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "55," except admits that the said account consisted of assets held for Sociedad.

As and For an Affirmative Defense

5. This Court lacks jurisdiction over this defendant and third-party defendant in that process in conformity with

the applicable laws and statutes essential to confer jurisdiction over this defendant and third-party defendant to the cross and third-party claims was not properly served upon this defendant and third-party defendant.

WHEREFORE, defendant and third-party defendant Sociedad Anonima de Inversiones Commerciales e Industriales prays for judgment that the cross and third-party claims herein be dismissed.

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Defendant and Third-Party Defendant Sociedad Anonima de Inversiones Commerciales e Industriales

By _____
A Member of the Firm

Office & P.O. Address:
122 East 42nd Street
New York, N.Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

Plaintiff,

-v-

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONES COMMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

Defendants.

- -x

ANSWER TO AMENDED COMPLAINT

Civil Action
71 Civ. 928

Defendant, Sociedad Anonima de Inversiones Commerciales e Industriales, answering the amended complaint herein, upon information and belief, except as otherwise specified:

1. Denies the allegations contained in paragraph "3."

2. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "5."

3. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "7."

4. Denies the allegations contained in paragraph "8."

As and For an Affirmative Defense

5. This Court lacks jurisdiction over this defendant in that defendant has not been properly served with process. More particularly, there has been a failure to serve the summons and complaint herein as required by law to subject this defendant to the jurisdiction of this Court in this litigation.

WHEREFORE, defendant Sociedad Anonima de Inversiones Commerciales e Industriales, prays for judgment that the complaint herein be dismissed.

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Defendant Sociedad
Anonima de Inversiones Commerciales
e Industriales

By Samuel Gottlieb
A Member of the Firm

Office & P.O. Address:
122 East 42nd Street
New York, N.Y. 10017

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71-0572

A 145

Filed 10/5/73

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI, et al.,

Defendants.

: NOTICE TO TAKE DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS

71 Civ. 928 (KTD)

- x

diary 10/4/73
deposition pltf 10/24/73
ptrom

S I R S :

PLEASE TAKE NOTICE that the plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, pursuant to Rule 26 of the Federal Rules of Civil Procedure, will take the deposition of defendant Benedict Ginsberg, at 9:30 o'clock in the forenoon on the 24th day of October, 1973, in Room 321 of the United States Courthouse, Foley Square, New York, New York, and that pursuant to Rule 34 of the Federal Rules of Civil Procedure, defendant Benedict Ginsberg is directed to produce at that deposition all books and records, correspondence, diary entries, contracts, and other written data which is or may be relevant in respect of Benedict Ginsberg's representation of plaintiffs in the action styled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Company, Index No. 27939/66 (Sup. Ct. N.Y. Co.).

DPL:eb
71-0572

A 146

Dated: New York, New York

October 3, 1973

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America

By: David P. Land

DAVID P. LAND
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: 212 264-6321

TO:

Cravath, Swaine & Moore, Esqs.
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Chemical Bank

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017
Attorney pro se

Gainsburg, Gottlieb, Levitan
& Cole, Esqs.
122 East 42nd Street
New York, New York 10017
Attorneys for SAICI

DPL:eb
71-0572

A 147

Filed 10/5/73

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI, et al.,

Defendants.

: NOTICE TO TAKE DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS

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71 Civ. 928 (KTD)

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diary 10/4/73
deposition put - Nov. 6 1973
gtrans

- x

S I R S :

PLEASE TAKE NOTICE that the plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, pursuant to Rule 26 of the Federal Rules of Civil Procedure, will take the deposition of defendant Sociedad Anonima de Inversiones Commerciales e Industriales ("SAICI"), by its employee, officer, or director having knowledge of the facts in respect of SAICI's contention that the property maintained in an account at the defendant Chemical Bank by Adriana Bosurgi and the defendents Leone Bosurgi and Emilio Bosurgi, constituted the property of SAICI, at 9:30 o'clock in the forenoon, on the 6th day of November, 1973, in Room 321 of the United States Courthouse, Foley Square, New York, New York, and that pursuant to Rule 34 of the Federal Rules of Civil Procedure, SAICI is directed to produce at that deposition all of its books and

DPL:eb
71-0572

records, correspondence, contracts, agreements, drafts, notes, vouchers, invoices, and other written records, or copies thereof, in the possession of SAICI, relating to its claim in this action.

Dated: New York, New York

October 3, 1973

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America

By: David P. Land

DAVID P. LAND
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: 212 264-6321

TO:

Cravath, Swaine & Moore, Esqs.
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Chemical Bank

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017
Attorney pro se

Gainsburg, Gottlieb, Levitan
& Cole, Esqs.
122 East 42nd Street
New York, New York 10017
Attorneys for SAICI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

----------x

NOTICE PURSUANT TO SECTION 30(d)

71 Civ. 928 (KTD)

S I R S :

PLEASE TAKE NOTICE that, pursuant to Section 30(d) of the Federal Rules of Civil Procedure, the undersigned hereby demands that the deposition of BENEDICT GINSBERG, heretofore noticed for the 24th day of October, 1973, be suspended pending hearing and determination of the motion made herein for a protective order.

Dated: New York, N. Y.
October 12, 1973.

Yours, etc.

/s/ BENEDICT GINSBERG

BENEDICT GINSBERG
Attorney Pro Se
475 Fifth Avenue
New York, N. Y. 10017
MU 3-7079

TO:
PAUL J. CURRAN, ESQ.
United States Attorney
Attorney for Plaintiff
United States Courthouse
Foley Square, New York, N. Y. 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Defendant Chemical Bank New York Trust Company
One Chase Manhattan Plaza
New York, N. Y. 10005

GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
Attorneys for Defendant Sociedad Anonima de Inversiones Comerciales e Industriales
122 East 42nd Street
New York, N. Y. 10017

NOTICE OF MOTION BY BENEDICT GINSBERG, ESQ. DATED OCTOBER 12, 1973 FOR A PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

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NOTICE OF MOTION

71 Civ. 928 (KTD)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of BENEDICT GINSBERG, sworn to the 12th day of October, 1973, and the exhibits annexed thereto, the undersigned will move this Court on the 30th day of October, 1973, at 2:15 o'clock in the afternoon, or as soon thereafter as counsel can be heard, in Courtroom 519 , United States Courthouse, Foley Square, New York, New York, for a protective order restraining the plaintiff from taking the deposition of BENEDICT GINSBERG, one of the defendants herein appearing pro se, pursuant to notice dated October 3, 1973 (Exhibit "A" hereof), and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, shall be served upon the undersigned at least five

(5) days before the return date of the motion.

Dated: New York, N. Y.
October 12, 1972.

Yours, etc.
/s/ BENEDICT GINSBERG
BENEDICT GINSBERG
Attorney Pro Se
475 Fifth Avenue
New York, N. Y. 10017
MU 3-7079

TO:
PAUL J. CURRAN, ESQ.
United States Attorney
Attorney for Plaintiff
United States Courthouse
Foley Square
New York, N. Y. 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Defendant
Chemical Bank New York Trust Company
One Chase Manhattan Plaza
New York, N. Y. 10005

GAINSBURG, GOTTLIEB, LEVITAN
& COLE, ESQS.
Attorneys for Defendant Sociedad Anonima
de Inversiones Comerciales e Industriales
122 East 42nd Street
New York, N. Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

AFFIDAVIT

71 Civ. 928 (KTD)

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am one of the defendants herein, appearing pro se, and submit this affidavit in support of an application for a protective order to restrain the plaintiff from taking my deposition pursuant to notice dated October 3, 1973. A copy of the notice is Exhibit "A" hereof.

The plaintiff has a rather questionable and uncertain claim against the late Adriana Bosurgi, a native and resident of Italy. I describe the claim in the language used above because the Assistant U. S. Attorney now in charge of the case, who discussed the claim with me in the conversation to which further reference is made below, told me that the claim was not properly computed and that the amount thereof will be reduced from $666,780.72 to "approximately $180,000".

I am a party to this action presumably because the United States of America recognizes that if it should ever establish its right to assert a lien against moneys which are claimed at some time in the past to have been deposited in an account over which Adriana Bosurgi was one of three persons having ownership, I have a superior lien.

A brief description of the circumstances in which my lien accrued, is appropriate at this point.

By agreement, a copy of which is Exhibit "B" hereof, I was retained by Leone Bosurgi and Emilio Bosurgi, the sons of Adriana Bosurgi, to institute suit against Chemical Bank New York Trust Company (hereinafter "Chemical Bank"), to recover the damages sustained by the said Messrs. Bosurgi by reason of the Bank's misconduct. The Bank had converted to its own use 5,200 shares of stock in corporations listed on the New York Stock Exchange, which stock was owned by the said Messrs. Bosurgi, and which the Bank held as custodian.

The Bank had improperly applied the stock as collateral for loan which it made to third parties, with a resulting 100% loss. Chemical Bank had claimed that it was authorized, not by the Messrs. Bosurgi, but by a prospective borrower, to use the stock of the Messrs. Bosurgi as collateral for a loan to the borrower, who had allegedly represented to Chemical Bank that one of the Messrs. Bosurgi had orally

given the borrower his consent to use the stock as collateral, and had orally authorized the borrower so to inform the Bank.

The action against the Chemical Bank was duly instituted in the Supreme Court of the State of New York, New York County. Depositions were taken, of Chemical Bank, and of the Bosurgis, in New York, and in Italy. There were numerous motions, two of which were the subject of review on appeal to the Appellate Division of the Supreme Court of the State of New York. The case thereafter came on for trial before Mr. Justice Kapelman, at Trial Term Part XII, Supreme Court, New York County. He conducted an all-day conference in chambers, which resulted in the settlement of the action on terms dictated into the record.

The Internal Revenue Service (hereinafter "IRS") had, shortly prior to the settlement described above, notified Chemical Bank, by letter addressed to the Chemical Bank, that IRS took the position that the stock of the Bosurgis described above, had been acquired with funds that had at one time been either the sole property of Adriana Bosurgi or the joint property of Adriana, Leone and Emilio, and that IRS might at some time thereafter institute an action to assert its lien.

It should be noted that whatever interest Adriana Bosurgi may have had in funds which were eventually used to

acquire the securities which were totally dissipated by the Chemical Bank, in the circumstances described above, there were no funds in existence when I instituted the action on behalf of Leone Bosurgi and Emilio Bosurgi against Chemical Bank. In fact, that action was predicated upon the fraudulent conduct of the Bank in inducing the Bosurgis to execute documents renouncing their claims, and it was the action for that fraud, which resulted in the settlement.

When the amount of the settlement, to wit, $215,000, was agreed upon, the attorneys for Chemical Bank, raised the question of what might occur if an action should thereafter be instituted by IRS. I agreed that if the proceeds of the settlement were paid to me, as attorney for Leone Bosurgi and Emilio Bosurgi, I would hold the money "in escrow pending determination of claims asserted" by the IRS against Chemical Bank.

In violation of its obligation to turn over the moneys to me pursuant to the foregoing stipulation which was entered into on September 15, 1970, the Bank did nothing and I was required to institute a proceeding to compel them to turn over the money.

At or about that time the United States of America made an application in this Court to enjoin the payment to me of said sum of $215,000 pursuant to the terms of the stipulation described above. The matter came on for argument before

Hon. Dudley D. Bonsal, who by order made March 12, 1971 directed the Bank to pay said sum of money to me, with the further direction (a) that I purchase certificates of deposit (so that the money would not be dormant until its release was authorized), and (b) that I hold the money in escrow subject to whatever lien the United States of America might have, and subject to any further order of this Court.

A copy of Judge Bonsal's order is Exhibit "C" hereof.

I was not made a party to this action until some nine months later, and, so far as the U. S. Attorney's office is concerned, the matter has been dormant since then -- a period of approximately 22 months.

Immediately upon being served with process in this action, I served a notice upon the U. S. Attorney's office to take such depositions as might reveal the basis of its claim. The depositions were scheduled for January 13, 1972. At the request of the Assistant then in charge of the matter, we did not proceed with the deposition. Obviously, if as recently as last week, 21 months after the notice of examination was served, the position of the United States of America is so uncertain that the claim of $666,000 is found to be excessive, and the assistant now in charge is talking about reducing it to $180,000, the claim is, to put it mildly, uncertain.

After the occurrence of the events described above,

a foreign corporation, Sociedad Anonima de Inversiones Comerciales e Industriales (hereinafter "SAICI") instituted an action claiming the funds in my possession on the ground that it was the original owner of the moneys deposited with Chemical Bank, having delivered the same to the Bosurgis under the terms of a written agreement pursuant to which the Bosurgis held the money "...in 'fiduciary administration' for and on behalf of SAICI".

I conferred with my clients, for which purpose I made a trip to Europe, and was informed by them that they could supply no information upon the basis of which I could properly oppose a motion by SAICI for summary judgment. My trip was required because a motion for that relief had been made, and it was essential that I either oppose the motion upon proper grounds, or permit it to be disposed of, without opposition. I submitted an affidavit indicating what I had been informed by my clients, as stated above.

At the same time, I made a motion to fix my fee and to authorize me to retain out of the moneys held by me in escrow, the amount due pursuant to my retainer, subject of course to the further order of this Court, as required by Judge Bonsal's decision, described above.

SAICI's motion for summary judgment and my motion to fix my fee were referred by the Judge at Special Term to Judge

Kapelman, who had participated in the settlement negotiations. He denied both motions, that is, the motion for summary judgment, and the motion addressed to the question of my fee, stating in his opinion (Exhibit "D" hereof), that both motions "are not ripe for determination".

SAICI's attorneys, and I, separately took appeals from Mr. Justice Kapelman's order, and those appeals are to be submitted at the current term of the Appellate Division, First Department, argument having been scheduled for October 16.

The U. S. attorney sought to intervene in that appeal, by addressing a lengthy letter to the Justices of the Appellate Division. He was thereafter informed by the Deputy Clerk of the Appellate Division by letter dated September 18, 1973, that the procedure of addressing a letter to the Justices of the Appellate Division, on behalf of a person not a party, was inappropriate. He was also informed that he "may apply for leave to file a brief amicus curiae on notice to the parties upon the appeal". To date, no such application has been made.

On October 1, 1972, the present U. S. Attorney in charge of the above matter, David Land, telephoned me to discuss "settlement". It was in this conversation that he told me that the Government's claim was inaccurately asserted as $660,000 plus, instead of approximately $180,000. He said

that in his opinion I was not entitled to what my retainer called for because it was not a "litigated matter", which indicated the extent to which he was unfamiliar with the situation.

Two days later I received the notice to which this motion is addressed.

My objection to the taking of my deposition, and this motion for a protective order, is based on the following grounds:

1. Depositions are premature, at least until the United States of America has been able to demonstrate that whatever claim it has against the estate of Adriana Bosurgi may be asserted against the fund created as the result of my efforts, which as indicated above, were not asserted on behalf of Adriana Bosurgi or her estate. It will also be noted that until the commencement of the litigation in which I successfully obtained the sum of $215,000, there was no fund, in existence, anywhere, to which any claim could attach. Chemical Bank did not have a sum of money, the ownership of which was in dispute. Chemical Bank had had some securities, which it had dissipated, and which were non-existent. There was no fund of any nature whatever, until the successful determination of the action which I insti-

tuted, on behalf of Leone Bosurgi and Emilio Bosurgi.

2. The Appellate Division of the Supreme Court now has pending before it the appeals described above, one of which may result in fixing my fee. The United States of America sought to intervene in the manner described above, but has taken no further action with respect thereto. Whether my fee is fixed by the order of the Appellate Division, or by the Supreme Court of the State of New York, which is the only appropriate forum for fixing my fee, and the only place where the United States of America can be heard, if at all, the application to take my deposition, in this action, is premature.

3. The Appellate Division also has before it the appeal of SAICI, from the order denying its motion for summary judgment, on the ground that the action is not yet ripe for such a motion. If the Appellate Division should reverse, and direct summary judgment in favor of SAICI, or if SAICI should prevail in a trial of the action, then it will have been determined that the money in question was the money of SAICI, and the United States of America could in no conceivable circumstance have any claim against it. For that reason, the application to take my deposition is also premature.

4. I also direct attention to the fact that my

fees are not claimed, or measurable on quantum meruit, but are based on a contract, executed prior to the commencement of the action, specifying precisely what I am to get. Additionally, after the settlement was reached, my clients reacknowledged the terms of compensation, and reaffirmed the amount of my fee, specifying precisely how much it is and how it is computed. The original retainer is an exhibit hereto. The confirmation referred to above is Exhibit "E" hereof.

5. In no event should I be required to produce at any deposition, the items described in the notice, to wit: "all books and records, correspondence, diary entries, contracts, and other written data which is or may be relevant in respect of Benedict Ginsberg's representation of plaintiffs in the action styled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Company, Index No. 27939/66 (Sup. Ct. N.Y. Co.)". My retainer is not based on quantum meruit. Unless the United States of America is prepared to assert, on the basis of some substantial knowledge, the nature of which it is prepared to reveal, that my retainer is the product of a fraudulent conspiracy on my part to defeat the claim of the United States of America, no one can go behind the written retainer, and the description of the enormous services heretofore described, and inquire into

all of my books, records and other documents described above. The nature of the case, in broad outline as indicated above, and the written retainer for 40% of the recovery, are sufficient. Until such time as the United States of America can successfully set aside the retainer, an inquiry as to the detailed services performed thereunder, is obviously nothing more than a harassing tactic, undertaken by the present Assistant U. S. Attorney in charge of this case, to force settlement after I had refused, in our conversation of October 1, to accept as my fee, such amount as he might suggest.

In view of the foregoing, an order should be made directing that my deposition should not be taken, and vacating the notice to take the same.

Sworn to before me this

12th day of October, 1973.

BENEDICT GINSBERG

BENEDICT GINSBERG

ROSE MAMLOUK
Notary Public, State of New York
No. 31-7688429
Qualified in New York County
Commission Expires March 30, 1974

EXHIBIT "A" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-145

A 164

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Samuel Fischer, Esq., and
Henry J. Zacharias, Esq.
545 Fifth Avenue
New York, New York 10017

Dear Sirs,

We hereby retain your services to represent us in connection with a legal action to be instituted against Chemical Bank New York Trust Company and, if deemed appropriate by you, against other defendants to recover damages sustained by us in connection with certain loans and other investments principally involving Expositions de France, Inc. and one Leslie Winkler.

In consideration of the services rendered and to be rendered by you in connection with said action and the preparation thereof, the following terms of compensation, which we are hereby confirming, have been agreed upon between us.

1. You will receive a fixed fee totalling $17,500.00, payable as follows:

   $8,500.00 - immediately,

   $4,500.00 - prior to the commencement of pre-trial proceedings,

   $4,500.00 - when the case is placed on the trial calendar or, if the litigation terminates earlier, upon its termination.

2. In addition to said fixed fee, you will receive a contingent fee equivalent to 40% of that portion of the amounts recovered by way of judgment or settlement, which is in excess of $17,500 and of disbursements hereafter incurred.

3. The foregoing fixed fees and contingent fees shall be deemed also to constitute full compensation for such services as may hereafter be rendered in this matter by Judge Edward K.Kennedy, as well as for the services heretofore rendered in this matter by Samuel Fischer, Esq., and Henry J. Zacharias, Esq.

4. In addition to the fees payable by us as hereinabove provided, we agree to reimburse you for all out-of-pocket expenses heretofore or hereafter incurred by you, or by any one of you, on our behalf in connection with the investments, loans and claims referred to above, to the extent that such expenses are not covered by the sum of $1,400.00 previously advanced by us to Mr. Henry J. Zacharias against disbursements. Such reimbursement will be made by us from time to time, upon receiving your respective expense statements.

Dated: 1966

Dr. Emilio Bosurgi

Dr. Leone Bosurgi

Approved:

Prof. Avv.
Domenico Barillaro

EXHIBIT "C" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-33

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EXHIBIT "D" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-370

EXHIBIT E TO FOREGOING AFFIDAVIT

A 167

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Bosurgi v. Chemical Bank

Dear Sir:

This will confirm our understanding with respect to fees in the above matter.

Pursuant to the terms of our retainer, dated December 1966, you were to receive and you have received the sum of $17,500. You were also to receive a contingent fee of 40% of the amount of the recovery in excess of said sum of $17,500 and of the disbursements thereafter incurred, which, if advanced by you, would be reimbursed by us. Total disbursements were incurred in the amount of $2,984.65. Accordingly, your 40% is to be computed on the total recovery in excess of $17,500 plus $2,984.65, to wit, $20,484.65. You were holding in escrow a certificate of deposit issued April 29, 1971 by Chase Manhattan Bank in the amount of $215,000. 40% of the net of $215,000 minus $2,984.65 is $77,806.14. You are to receive that sum plus $994.05, which you spent in disbursements not previously reimbursed to you. You are also to receive 40% of the sums which have accrued or will hereafter accrue on the $215,000 and on the increment thereof.

Yours truly,

Leone Bosurgi

P.S. I acknowledge receipt of a photocopy of the renewed Certificate of Deposit dated July 28, 1971 in the amount of $217,485.94, which amount represents the sum originally deposited together with accrued interest thereon to July 28, 1971. I understand that you will "roll over" this amount, from time to time, until you are permitted by an appropriate order of the court to disperse the funds.

Leone Bosurgi

EXHIBIT "E"

AFFIDAVIT BY ASSISTANT U.S.ATTORNEY DAVID P. LAND DATED OCTOBER 25,1973 IN OPPOSITION TO MOTION BY BENEDICT GINSBERG,ESQ. FOR A PROTECTIVE ORDER

A 168

DPL:eb
71-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED 10-26-73

UNITED STATES OF AMERICA,
Plaintiff,

- v -

LEONE BOSURGI and EMILIO BOSURGI, As Executors of the Estate of Adriana Bosurgi, Deceased, CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and BENEDICT GINSBERG,
Defendants,

- and -

ESTATE OF ADRIANA BOSURGI, Deceased, and W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

- and -

CHEMICAL BANK,
Third-Party Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, Individually, and as Executors of the Estate of Adriana Bosurgi, Deceased, As Trustees of a Trust for the Benefit of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, As Agents of SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and As Agents of W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, Deceased, SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,
Third-Party Defendants.

AFFIDAVIT

71 Civ. 928
(KTD)

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71-0572

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and represent the United States of America in the above-captioned action.

2. This affidavit is submitted in opposition to the motion by the defendant Benedict Ginsberg, Esq. to stay his deposition by the United States in respect of the amount of his reasonable compensation for an attorney's fee.

3. The basis of the opposition, briefly stated, is (1) that an in rem default judgment was entered by this Court in favor of the United States against the defendants Leone Bosurgi and Emilio Bosurgi in respect of a $215,000 fund held in escrow by Benedict Ginsberg, Esq., (2) that no other party hereto, except Benedict Ginsberg, Esq., has a lien priority superior to the judgment held by the United States to the $215,000 fund, and (3) that the lien priority of Benedict Ginsberg, Esq. is allowable to the extent of his reasonable compensation for a portion of his representation

of Leone and Emilio Bosurgi in their action against Chemical Bank maintained in the Supreme Court, New York County. Accordingly, upon determination of the amount of the reasonable compensation of Benedict Ginsberg, Esq., such amount shall be allowed out of and deducted from the $215,000 fund, and the balance thereof shall be remitted to the United States. Thus, the determination of the reasonable compensation of Benedict Ginsberg, Esq. should proceed forthwith.

4. This action was commenced on March 3, 1971 by the United States to recover a money judgment in the amount of $666,780.72 against the defendants Leone Bosurgi and Emilio Bosurgi, individually, and as executors of the Estate of Adriana Bosurgi, deceased, and the defendant Chemical Bank, as statutory executor of the Estate of Adriana Bosurgi.

5. The basis of this action is as follows: Adriana Bosurgi was a nonresident alien of the United States, who died on March 27, 1963. At the time of her death, she maintained a security account at the Chemical Bank with a fair market value of $1,097,189.39. Additionally, at the time of her death she maintained a brokerage account at Dodge & Olcott, Inc., with a fair market value of $105,551,08. The total fair market value of the property belonging to Adriana Bosurgi at the time

of her death was thus $1,202,740.47. Section 2101(a)* imposes an estate tax on the estate of every nonresident alien. Section 2103 defines the gross estate of a nonresident alien as the value of the decedent's property at the time of her death situated in the United States. Pursuant to Section 2104, the accounts maintained at Chemical Bank and Dodge & Olcott, Inc., constituted property within the United States. Accordingly, the Estate of Adriana Bosurgi was subject to an estate tax. No estate tax return was filed and no estate tax has been paid. Section 2002 provides that the estate tax shall be paid by the executor. Section 2203 defines the term "executor" as the appointed executor or administrator, or if none has been appointed, then any person in actual or constructive possession of any property of the decedent. Additionally, Section 6901 provides that any transferor or transferee of the decedent's property shall be liable for the estate tax up to the amount of the property transferred. The security account maintained at Chemical Bank was in the name of Adriana Bosurgi with a power of attorney in the name of her two sons, Leone and Emilio Bosurgi. After Adriana Bosurgi died, Emilio and Leone Bosurgi and Chemical Bank transferred Adriana Bosurgi's security account into a new security account at Chemical

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* Section references are to the Internal Revenue Code of 1954, 26 U.S.C.

Bank in the names of Leone and Emilio Bosurgi. Chemical Bank asserts that it was without knowledge of Adriana Bosurgi's death at the time of this transfer. As the result of apparently improvident investments by Chemical Bank, the entire value of the new security account became worthless. In 1966 Leone and Emilio Bosurgi, in their own individual names, commenced an action against Chemical Bank in the Supreme Court, New York County, to recover the value of their security account. The Bosurgis were represented in that action by Benedict Ginsberg, Esq. That action was settled for $215,000. However, before the settlement was paid, the United States commenced the instant action. Because Chemical Bank was in possession of Adriana Bosurgi's property at the time of her death and because Chemical Bank transferred her property, the United States maintained that Chemical Bank was liable for the estate tax plus statutory additions. Because Leone and Emilio Bosurgi were transferees of the property of Adriana Bosurgi and because they exercised dominion and control over her property, the United States maintained that Leone and Emilio Bosurgi were liable for the estate tax plus statutory additions.

6. The liability asserted against the defendants was $666,780.72, consisting of $403,988.78 as tax, $100,997.20 as a penalty, and the balance as accrued interest. However, the liability asserted appears to have been computed pursuant to Section 2001, which Section is

applicable only to the estates of citizens or residents of the United States. The estate tax applicable to the Estate of Adriana Bosurgi, a nonresident alien, is computed pursuant to Section 2101(a). The taxable estate consists of the $1,202,740.47 gross estate, less $2,000 as a statutory deduction, or $1,200,740.47. The tax due on $1,200,740.47, computed pursuant to Section 2101(a) is $160,148.09. The 25% penalty due pursuant to Section 6651 is $40,037.02. Interest accrues at the rate of 6% per annum on the unpaid tax liability from the date the taxes were due, which was 15 months after the date of death of Adriana Bosurgi, or June 27, 1964.

7. In respect to the $215,000 settlement fund, this Court on March 18, 1971 entered an order directing Chemical Bank to remit that sum to Benedict Ginsberg, Esq., to purchase certificates of deposit and to hold such certificates in escrow subject to and impressed with any and all liens of the United States, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000.

8. On November 29, 1971, this Court granted the United States' motion to serve an amended complaint joining Benedict Ginsberg, Esq. and Sociedad Anonima de Inversiones Commerciales e Industriales ("SAICI") as additional defendants.

9. Benedict Ginsberg, Esq. was joined as a defendant because he may have an interest in any amount recovered by the United States in respect of his reasonable compensation for obtaining the $215,000 fund in the Bosurgis' action against Chemical Bank.

10. SAICI was joined as a defendant because in 1971 SAICI commenced an action in the Supreme Court, New York County, against Leone and Emilio Bosurgi and Benedict Ginsberg seeking to recover the $215,000 fund. SAICI alleged, in essence, that Adriatica, Leone and Emilio Bosurgi maintained the security account at Chemical in "fiduciary administration" for SAICI. Thus, because SAICI may have an interest in any amount recovered by the United States of America, SAICI was joined as a defendant.

11. On June 2, 1972, this Court entered an in rem default judgment in favor of the United States and against Leone and Emilio Bosurgi in the amount of $215,000, together with interest thereon. A copy of the default judgment is annexed hereto as Exhibit A. Thus, the United States has established its right to the $215,000 fund, subject to the superior lien priorities of any other person.

12. Benedict Ginsberg, Esq. has a lien priority to the $215,000 fund superior to the judgment of the United States because Sections 6323(b)(8) and 6324(c) provide that the tax lien of the United States shall be

subordinate to the claim of an attorney to the "extent of his reasonable compensation" in obtaining, by reason of a judgment or settlement of a claim, the property to which the tax lien of the United States attaches. Benedict Ginsberg, Esq., by reason of his representation of the Bosurgis in their state court action against Chemical Bank, obtained the $215,000 fund to which the tax lien of the United States attached. Thus, to the "extent of his reasonable compensation" in obtaining that fund, Benedict Ginsberg is entitled to allowance of his attorney's fee out of the $215,000 fund.

13. The office of the United States Attorney does not have information to determine what the amount of Benedict Ginsberg's "reasonable compensation" is. In an effort to establish that amount, I telephoned Benedict Ginsberg, Esq. in the hope that an amount could be established without the need for litigation. Benedict Ginsberg, Esq. took the position that the arrangement established between him and the Bosurgis and the amount thereof was not subject to inquiry by the United States. However, the courts have held that the United States may inquire into the reasonableness of an attorney's fee. United States v. Fidelity-Philadelphia Trust Company, 459 F. 2d 771 (3rd Cir. 1972); and Columbia Casualty Co. v. Consolidated Shipping Co., 68-1 USTC ¶9281 (E.D. La. 1967). Accordingly, the United States noticed the deposition of Benedict Ginsberg, Esq.

14. The only other person who may have an interest in any amount recovered by the United States is SAICI. When SAICI was joined as a defendant because of its possible interest in this litigation, it moved on January 11, 1972 to vacate service of the amended complaint. SAICI's motion was denied by this Court on June 5, 1972, and SAICI answered the amended complaint on July 3, 1972. However, SAICI has no viable claim to the $215,000 fund. The default judgment in respect to the $215,000 fund in favor of the United States and against the Bosurgis was entered on June 2, 1972. Because SAICI takes the position that the Bosurgis are its agents in respect to the security account maintained at Chemical Bank, SAICI is bound by the acts of its agents, including their default in this litigation. SAICI's remedy, not yet exercised, is to move this Court pursuant to Rule 60 of the Federal Rules of Civil Procedure to vacate the default judgment. Until and unless the default judgment is vacated in respect to any interest SAICI may have in the $215,000 fund, the only pending matter in respect of the $215,000 fund is the determination of the reasonable compensation of Benedict Ginsberg.

15. Finally, Benedict Ginsberg's assertion that his claim for an attorney's fee out of the $215,000 fund can be established only in the state court, is legally erroneous. Because the United States has a lien upon the

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$215,000 fund, the state court could effect that lien only if the United States were made a party to the state court action pursuant to 28 U.S.C. §2410. The United States is not a party to any state court action involving the $215,000 fund and accordingly, any state court judgment would not affect the lien of the United States.

WHEREFORE, it is respectfully submitted that Benedict Ginsberg's motion to stay his deposition be denied.

/s/

DAVID P. LAND
Assistant United States Attorney

Sworn to before me this

25 day of October, 1973

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

EXHIBIT "A" ANNEXED TO THE FOREGOING AFFIDAVIT IS

REPRODUCED IN THIS APPENDIX AT PAGE A-122

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

----------x

REPLY AFFIDAVIT

71 Civ. 928 (KTD)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am one of the defendants herein, appearing pro se, and submit this reply affidavit in support of my motion for a protective order to restrain the plaintiff from taking my deposition.

My affidavit of October 12, 1973 sets forth five specific grounds upon which I object to the taking of my deposition. The answering affidavit of David P. Land, Esq. does not address itself to my objections.

I urged as objection No. 1 that any depositions would be premature, at least until the plaintiff has demonstrated that whatever claim it has against the Estate of Adriana Bosurgi, may be asserted against the fund created as a result of my

efforts, which as I indicate in my moving affidavit, were not asserted on behalf of her, or on behalf of her estate. As indicated in my affidavit, at the time the litigation was commenced, which resulted in the delivery to me of the funds I now hold, there was no fund in existence, anywhere, which could be said to be due or owing to Adriana Bosurgi, and accordingly there is no basis for assuming that someone who had a claim against her, can assert that claim against the fund. In this context, until the plaintiff has established that its claim against Adriana Bosurgi can be asserted against this fund, it is premature to take my deposition as to the services I performed in creating the fund.

I urged as objection No. 2 that the Appellate Division of the State Supreme Court has pending before it, an appeal which was argued on October 16, which will result in fixing my fee, at the amounts set forth in my retainer, or in such other manner as the Appellate Division may direct. Pending the decision of the Appellate Division, the result of which may significantly affect this action, it is premature to take my deposition. I suggested to Mr. Land that the subject motion be adjourned for that reason, but he refused.

I urged as objection No. 3 that the Appellate Division also has before it, another appeal, also argued on October 16, which may result in a determination that the entire

fund (subject to my fee) is the property of SAICI, in which event plaintiff has no claim to any part of the fund, either before or after the determination of the amount of my fee. The answering affidavit does not address itself to this objection.

I urged as objection No. 4 that since my fee is not, by agreement, based on quantum meruit, but was fixed in advance, specifically, and since the amount thereof is not claimed to be unconscionable or otherwise invalid, there is no basis for taking my deposition, because the theory upon which I would be deposed, would be to determine the value of my services -- and that is not an appropriate issue in this case.

I urged as objection No. 5 that since the plaintiff has not asserted, let alone submitted any evidence to indicate that such an assertion would be based on some demonstrable fact, that my retainer is the product of a fraudulent conspiracy on my part to defeat the claim of the United States of America, no one can go behind the written retainer, and conduct a wide-ranging examination such as is indicated by the notice. Until the retainer has been set aside, an inquiry as to the detailed services performed thereunder, for the purpose of determining the fair value of those services, cannot, in the face of a specific agreement for compensation, be deemed appropriate.

The answering affidavit is predicated solely on the contention that the United States of America has a claim against Adriana Bosurgi. I did not represent her. The action in which I recovered the money I now hold in escrow, was not initiated on her behalf; it was not not based on any right or claim she ever had; in fact her name was not even mentioned in that action.

The serious inadequacy of the opposition to my motion is apparent from what the answering affidavit reveals about the even more serious flaws in the claim of United States of America. At page 2 the affiant states:

> "The basis of the opposition, briefly stated, is (1) that an in rem default judgment was entered by this Court in favor of the United States against the defendants Leone Bosurgi and Emilio Bosurgi in respect of a $215,000 fund held in escrow by Benedict Ginsberg, Esq., (2) that no other party hereto, except Benedict Ginsberg, Esq., has a lien priority superior to the judgment held by the United States to the $215,000 fund, and (3) the lien priority of Benedict Ginsberg, Esq., is allowable to the extent of his reasonable compensation for a portion of his representation of Leone and Emilio Bosurgi in their action against Chemical Bank maintained in the Supreme Court, New York County."

The "in rem default judgment" was obtained on the basis that the United States of America had a claim against the Messrs. Bosurgi for $666,780.72. However, Mr. Land admits at page 3 of the affidavit that the claim was erroneously computed, and should not have been asserted for $666,780.72 (the basis upon which the default judgment was predicated),

but only for $160,148.09. It would be more appropriate for Mr. Land to correct his admittedly erroneous default in rem judgment than to try to harass me by an inquiry into all the details of five years of litigation, an inquiry which, if the Appellate Division should decide either that the fund belongs to SAICI, or that the terms of my retainer are binding, would be entirely unnecessary.

Mr. Land is also in error in his statement "...that no other party hereto, except Benedict Ginsberg, Esq., has a lien priority superior to the judgment held by the United States...". If SAICI should establish, as the decision of the Appellate Division may well direct, that the fund was SAICI's property, SAICI is a party that has a priority superior to that of the United States of America.

In any event, distribution of the moneys I hold, including the portion to which I am entitled as a fee, will await the further action of this Court as required by Judge Bonsal's order (Exhibit C of my affidavit in support of the motion).

In view of the foregoing, I respectfully request that an order be made herein restraining the plaintiff from taking my deposition.

Sworn to before me this
29th day of October, 1973.

Benedict Ginsberg
BENEDICT GINSBERG

ROSE MAMLOUK
Notary Public, State of New York
No. 31-7688429
Qualified in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

71 Civ. 928 (KTD)

Plaintiff,

-against-

AFFIDAVIT

LEONE BOSURGI, et al.,

Defendants.

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am one of the defendants herein, appearing pro se, and submit this additional affidavit to bring to the attention of this Court the decision of the Appellate Division of the Supreme Court, on the appeals, the pendency of which are referred to in my prior affidavits in support of this motion to restrain the plaintiff from taking my deposition.

My objection to being deposed was based on the following:

The U.S.A. seeks to obtain funds which I hold in escrow. I have a lien upon the funds for services. Undisputely, the fund was created as the result of my efforts in an action instituted by me as attorney for Leone Bosurgi and Emilio Bosurgi (hereinafter "Bosurgi brothers") against

Chemical Bank. In that action I recovered the sum of $215,000, which I hold in escrow pursuant to an order of Mr. Justice Bonsal, to which further reference is made in my moving affidavit.

The U.S.A. contends that it was not Bosurgi brothers who should have been the claimants in that action, but their late mother, Adriana Bosurgi; that Adriana, since deceased, had moneys on deposit with Chase Bank at the time of her death, which moneys should have been administered as part of her estate; and that in such an administration, an estate tax would have been due by the estate of Adriana Bosurgi to the U.S.A.

Sociedad Anonima de Inversiones Comerciales e Industriales (hereinafter "SAICI") had instituted an action in the Supreme Court, New York County, asserting that the moneys I recovered on behalf of Bosurgi brothers, and also the moneys originally on deposit in the account of Adriana Bosurgi with Chase Bank, were SAICI's funds, held by the Bosurgis "in fiduciary capacity", in which event the U.S.A. would of course have no tax claim.

I stated in my prior affidavits that it was premature to consider the question of taking my deposition, at least until the U.S.A. could demonstrate that the moneys in my possession were not the proceeds of claims asserted by

the Bosurgi brothers, but were in fact moneys belonging to their mother. I pointed out that SAICI had moved for summary judgment in its action, and that I had made a cross-motion to fix my fee; that the motions had been denied; that appeals from the denials had been scheduled for argument on October 16. As I said in my affidavit of October 29, the decision of the Appellate Division "...may result in a determination that the entire fund (subject to my fee) is the property of SAICI, in which event plaintiff (the U.S.A.), has no claim to any part of the fund, before or after the determination of the amount of my fee".

The Appellate Division, by decision made yesterday, November 8, 1973, specifically so decided. The opinion directs summary judgment in favor of SAICI, on its appeal, stating in part:

> "...the fund in question represented the proceeds of a trust established in writing, December 10, 1954, between plaintiff and the Bosurgi defendants and their mother, Adriana Bosurgi; and that it belongs to plaintiff, for whom the defendants, Bosurgi, have been simply holding it in a fiduciary and custodial capacity. Thus, there is no genuine issue of fact in respect of title thereto."

The Appellate Division also directed summary judgment in my favor on my fee claim, directing a hearing to fix the amount of the fee.

The U.S.A. may assert that it was not a "party" to

the proceedings in the State Court, to which reference is made above. The extent to which the U.S. Attorney participated in those proceedings suggests that the U.S.A. is bound by the result, even if it was not formally a party. We refer to the following, all of which are set forth in detail in the record on appeal to the Appellate Division:

1. SAICI's motion for summary judgment was on notice to the U.S. Attorney (14-15)*.

2. SAICI's motion expressly stated:

> "The Government was formally advised that as the documentary record establishes, the Chemical Bank account was not and is not the property of the Bosurgis but belongs to plaintiff. Copies of the pleadings herein were served on the United States Attorney for the Southern District of New York, and on the law firm of Cravath, Swaine & Moore, Esqs., attorneys for the Chemical Bank". (25).

3. SAICI's motion papers included correspondence, copies of which were sent to the U. S. Attorney (26-7).

4. My motion to fix my fee, was on notice to the U. S. Attorney (97-8).

5. The opinion at Special Term, New York County, refers:

> (a) To a letter from "the Government" (the U.S.A.) dated October 28, 1971 (12).

---

* References are to the Record on Appeal.

(b) To an allegation by "the Government", "...without evidentiary proof that the Bosurgi brothers controlled Sociedad. The Government maintains that the most expeditious manner of disposing of the issue is to litigate the title to the fund in the Federal Court" (12).

6. SAICI's notice of appeal was addressed, among others, to the U. S. Attorney (3-4).

7. My notice of appeal was addressed, among others, to the U. S. Attorney (5-6).

In addition to all of the foregoing, the U. S. Attorney addressed a three-page letter to the Justices of the Appellate Division directly, "in respect" of the appeals determined by yesterday's decisions. A copy of that letter is annexed hereto, and also a copy of a letter from the Deputy Clerk of the Appellate Division, referring to his telephone conversation with the U. S. Attorney on September 18, advising him to make application for leave to file a brief amicus curiae. The U. S. Attorney apparently chose not to file a brief, but to have its position formally asserted by one of the other respondents, Chemical Bank. The above letters are Exhibits A and B hereof.

In the circumstances there appears to be no basis for the claim asserted by the U.S.A. in this action. While I do not at this time request that the action be dismissed, I do request that the motion to restrain the taking of my deposition be granted. I direct attention also to the fact

that in no event may I distribute the funds, under Judge Bonsal's order, without further application to this Court, which application I will make after the Supreme Court, pursuant to the remand of the Appellate Division, has fixed the amount of my fee.

Annexed hereto is the order of the Appellate Division and the decision of the Appellate Division, Exhibits C and D.

The Court Will note that the Appellate Division, expressly reversed Special Term in its reading of the decision in Vernitron Corp. et al. v. Benjamin, 440 F.2d 105 (2d CCA). Special Term had stated:

> "Sociedad argues that the question of title to the fund could only be decided in the State Court and cites Vernitron Corp. ...in this Court's view Vernitron is not dispositive here" (13).

The Appellate Division expressly reversed this in the concluding sentence of its order in which it refers again to the Vernitron case.

Sworn to before me this
9th day of November, 1973.

BENEDICT GINSBERG

A 190

DPL
71-0572

eb

September 14, 1973

The Honorable Justices of the
Supreme Court of the State of New York
Appellate Division
First Department
Madison Avenue and 25th Street
New York, New York 10010

Re: Sociedad Anonima de Inversiones
Commerciales e Industriales v.
Leone Bosurgi and Emilio Bosurgi,
Index No. 22140/71; and
Leone Bosurgi and Emilio Bosurgi
v/ Chemical Bank New York
Trust Company, Index No. 27939/66

Dear Sirs:

We are writing as amicus to the Court in respect of the above two actions currently on appeal. The United States is not a party in either action, but the interest of the United States is involved.

In 1971, the United States commenced an action in the United States District Court for the Southern District of New York seeking to foreclose federal estate tax liens of over $600,000 against Leone and Emilio Bosurgi and the Chemical Bank. Sociedad Anonima de Inversiones Commerciales e Industriales ("SAICA") and Benedict Ginsberg were joined as parties. In fact, the motion by SAICI to vacate service of the amended complaint was denied by the District Court on June 5, 1972, and the motion by the Bosurgis to set aside service of Chemical Bank's crossclaim was previously denied by the District Court on November 10, 1971. Thus, all parties in the State Court action are parties in the District Court action.

Exhibit "A"

DPL:eb
71-0372

One aspect of the District Court action involves the subject matter of the two State Court actions. In the State Court action, Bosurgi v. Chemical Bank, the Bosurgis sought a money judgment against Chemical Bank. That action was settled for $215,000. Prior to delivery of the settlement check to the Bosurgis, the District Court on March 18, 1971 directed Chemical Bank to remit the $215,000 settlement fund to the Bosurgis' attorney, Benedict Ginsberg, to be held in legal custody subject to the tax liens of the United States. In the State Court action SAICI v. Bosurgis, SAICI alleged that the $215,000 settlement fund belonged to it and not to the Bosurgis. Also, Benedict Ginsberg sought to secure an attorney's lien on the $215,000 settlement fund. The two State Court actions are on appeal because SAICI's motions to consolidate both actions and for summary judgment were denied, and because Benedict Ginsberg's motion for an allowance of attorney's fees was denied.

We respectfully urge that the orders appealed from be affirmed. First, the United States is not a party to either of the State Court actions. Any State Court judgment affecting the disposition of the $215,000 settlement fund on which the United States has a tax lien would have no effect on the interest of the United States. Only in the event that the United States was made a party to the State Court actions pursuant to 28 U.S.C. §2410 could the interests of the United States be affected. Second, the issues raised by the parties in the State Court actions are issues to be litigated in the District Court action in which all interested parties are present. Third, on June 1, 1972, the District Court entered a partial default judgment in rem in favor of the United States and against the Bosurgis in the amount of $215,000, plus interest thereon. Thus, the United States has foreclosed its tax lien on the $215,000 settlement fund, and any prior interest that either SAICI or Benedict Ginsberg has in this property must be litigated in the District Court against the United States.

DPL:eb
71-0572

Accordingly, we respectfully submit, as amicus to the Court, that the orders appealed from be affirmed.

Respectfully yours,

PAUL J. CURRAN
United States Attorney

By: David P. Land
DAVID P. LAND
Assistant United States Attorney
Chief, Tax Unit

cc:

Cravath, Swaine & Moore, Esqs.
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Chemical Bank

Gainsburg, Gottlieb, Levitan
& Cole, Esqs.
122 East 42nd Street
New York, New York 10017
Attorneys for SAICI

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017
Attorney for the Bosurgis and
Attorney pro se

EXHIBIT B TO FOREGOING AFFIDAVIT

A 193

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT
27 MADISON AVENUE
NEW YORK, N.Y. 10010

September 18, 1973

United States Attorney
Southern District of New York
Foley Square, N.Y. 10007
Att.: David P. Land, Esq.

Re: Sociedad Anonima de Inversiones Commerciales e Industriales v. Leone Bosurgi and Emilio Bosurgi; and Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Company
Cal. No. 1430

Dear Sir,

Pursuant to my telephone call this date, I return herewith the enclosed letter relating to the above-entitled appeal.

As I have advised, you may apply for leave to file a brief amicus curiae on notice to the parties upon the appeal.

Very truly yours,

Joseph J. Lucchi
Deputy Clerk

cc: Cravath, Swaine & Moore, Esqs.
Gainsburg, Gottlieb, Levitan & Cole, Esqs.
Benedict Ginsberg, Esq.

McGivern, J.P., Markewich, Kupferman, Lane, Steuer, JJ.

7588 Sociedad Anonima de Inversiones Comerciales e Industriales,
Plaintiff-Appellant-Respondent, S.Gottlieb

-against-

Leone Bosurgi, et ano.,
Defendants-Respondents,

-and-

Benedict Ginsberg,
Defendant-Respondent-Appellant. Pro Se

Leone Bosurgi, et ano.,
Plaintiffs,

-against-

Chemical Bank New York Trust Company,
Defendant-Respondent. A.P.Tashman

Order, Supreme Court, New York County (Kapelman, J.), entered on August 22, 1972, insofar as it denied plaintiff's motion for an order of consolidation or concurrent consideration and for summary judgment, unanimously reversed, on the law, and said order, insofar as it denied the cross-motion of defendant Benedict Ginsberg, Esq., unanimously modified, on the law and the facts, and the cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and without disbursements.

The main motion for summary judgment is meritorious. The documentary evidence submitted on the motion, conceded to be "genuine and authentic", conclusively demonstrates that the fund in question represented the proceeds of a trust established in writing, December 10, 1954, between plaintiff and the Bosurgi defendants and their mother, Adriana Bosurgi; and that it belongs to plaintiff, for whom the defendants, Bosurgi, have been simply holding it in a fiduciary and custodial capacity. Thus, there is no genuine issue of fact in respect of title thereto.

The posture of the Chemical Bank is not realistic. We perceive no development whereby the Bank could possibly be prejudiced by this grant of summary judgment. Nor can the pending Federal actions and proceedings present any bar to the entry of summary judgment in favor of the plaintiff, as the tax liens, if valid, are not affected.

In any event, we find no impediment to this Court's determining an issue of fact competently before it, regardless of peripheral Federal questions. Venitron Corp. v. Benjamin, 440 F 2d 105 (2d Cir.), cert. den., 402 U.S. 987. And it is clearly so when the plaintiff herein has not been stayed by a Federal court order.

Order filed.

Exhibit "C"

EXHIBIT D TO FOREGOING AFFIDAVIT

A 195

SM-14956-73

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 8, 1973

Present—Hon. Owen McGivern, Justice Presiding,
Arthur Markewich,
Theodore R. Kupferman,
Myles J. Lane,
Aron Steuer, Justices.

Sociedad Anonima de Inversiones Comerciales e Industriales,
Plaintiff-Appellant-Respondent,

-against-

Leone Bosurgi and Emilio Bosurgi,
Defendants-Respondents,

-and-

Benedict Ginsberg,
Defendant-Respondent-Appellant.

Action No. 1

7588

Leone Bosurgi and Emilio Bosurgi,
Plaintiffs,

-against-

Chemical Bank New York Trust Company,
Defendant-Respondent.

Action No. 2

Cross-appeals having been taken to this Court by the plaintiff-appellant-respondent and defendant-respondent-appellant from the order of the Supreme Court, New York County (Kapelman, J.), entered on August 22, 1972, denying without prejudice plaintiff's motion for an order of consolidation, or concurrent consideration and for summary judgment, and denying defendant Ginsberg's cross-motion for an order fixing his fee,

And said cross-appeals having been argued by Mr. Samuel Gottlieb of counsel for plaintiff-appellant-respondent, by Mr. Benedict Ginsberg, defendant-respondent-appellant, pro se, and by Mr. Andrew F. [illegible], of counsel for defendant-respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

Exhibit "D"

It is unanimously ordered that the order so appealed from insofar as it (1) denied plaintiff's motion be and the same hereby is reversed, on the law, and the motion granted, and (2) denied defendant Ginsberg's cross-motion be and the same hereby is modified, on the law and the facts, and the cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and without disbursements.

ENTER:

HYMAN W. GAMSO
Clerk.

71 Civ. 928 (KTD)

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

NOTICE OF MOTION,
AFFIDAVIT AND EXHIBITS

BENEDICT GINSBERG
Attorney for Pro Se
Office and Post Office Address, Telephone
475 Fifth Avenue
Borough of Manhattan New York, N. Y. 10017
MUrray Hill 3-7079

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

© 1966 GOLDSMITH BROS. 77 NASSAU ST., NEW YORK, N. Y. 10038

MICROFILM
NOV 15 1973

U. S. DISTRICT COURT
FILED
NOV 15 1973
S. D. OF N. Y.

ORDER OF DISTRICT COURT
DATED NOV. 14, 1973
GRANTING A PROTECTIVE ORDER

A 197

The underlying cause of action [illegible] is currently a matter of litigation in the New York state courts and in disposition there may and this court in determining this [illegible] the United States of America has effectively [illegible] to do anything about the plaintiff's [illegible] action and has pursued its [illegible] solely in this action. Since the [illegible] has permitted the plaintiff [illegible] to reach such a point that [illegible] fees are to be set, the requested protective order will be granted until such a determination has been made in the state court.

So ordered.

New York, New York
November 14, 1973

KEVIN THOMAS DUFFY U.S.D.J.

ORDER TO SHOW CAUSE AND STAY OF DISCOVERY OF SAICI ISSUED BY DISTRICT COURT ON 12/14/73

A 198

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	71 CIV 928 (KTD)
Plaintiff,	)	- ORDER TO SHOW CAUSE -
- against -	)	
LEONE BOSURGI, et al,	)	
Defendants.	)	

Upon reading and filing the affidavit of SAMUEL GOTTLIEB, Esq., sworn to the 13th day of December, 1973, and the exhibits thereto annexed, and the accompanying memorandum of law filed herewith pursuant to Rule 9(b) of the General Rules of this Court, it is:

O R D E R E D, that plaintiff UNITED STATES OF AMERICA show cause before the Honorable KEVIN THOMAS DUFFY, United States District Judge, in Courtroom 1105, United States Courthouse, Foley Square, New York, New York, on the 20th day of December, 1973 at ~~2:15~~ 10:30 o'clock in the ~~after~~fore noon thereof, or as soon thereafter as counsel can

be heard, why an order should not be granted herein pursuant to Rule 26 of the Federal Rules of Civil Procedure (a) staying depositions and discovery herein by plaintiff of defendant SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES (SAICI); (b) vacating the Notice to Take Deposition and Request for Production of Documents served by plaintiff on SAICI; and (c) for such other, further and different relief as to this Court may seem just and proper; and it is further

O R D E R E D, that pending the hearing and determination of this application that discovery and depositions by plaintiff of SAICI be and the same are hereby stayed.

L E T service of a copy of this Order to Show Cause and the papers upon which it is based on the plaintiff and other defendants on or before the 14th day of December, 1973 not later than 5 o'clock P.M. thereof be deemed good and sufficient service.

DATED: NEW YORK, N.Y.,
December 14th 1973.

Kevin Thomas Duffy /s/
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - LEONE BOSURGI, et al, Defendants.	71 CIV 928 (KTD) - A F F I D A V I T -

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL GOTTLIEB, being duly sworn, deposes and says:

I am a member of the firm of GAINSBURG, GOTTLIEB, LEVITAN & COLE, attorneys for defendant SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES (hereinafter "SAICI") and submit this affidavit in support of this application for an order staying depositions and discovery by plaintiff of SAICI and vacating the Notice to Take Deposition and Request for Production of Documents served by plaintiff on SAICI dated October 3, 1973. A copy of said Notice is annexed hereto as Ex. 1.

The Court is undoubtedly familiar with the facts herein as set forth in the affidavits of BENEDICT GINSBERG, Esq., submitted in support of his motion to restrain the taking of his deposition pursuant to notice served by plaintiff at the same time that this Notice was served on SAICI; suffice it that we incorporate by reference Mr. GINSBERG's affidavits and the exhibits attached thereto with the same force and effect as though hereto physically attached. The original filed papers will of course be submitted to this learned Court on the argument hereof.

The GINSBERG motion was argued on November 9, 1973. At that time, Your Honor was informed that the Appellate Division, First Department had by order dated November 8, 1973 unanimously reversed the order of Mr. Justice KAPELMAN denying SAICI's motions for summary judgment in, and consolidation or concurrent consideration of its State Court action and the pending and undetermined action which produced the fund here in suit before Mr. Justice KAPELMAN. The Court held:

> "The main motion for summary judgment is meritorious. The documentary

evidence submitted on the motion, conceded to be 'genuine and authentic', conclusively demonstrates that the fund in question represented the proceeds of a trust established in writing, December 10, 1954, between plaintiff and the Bosurgi defendants and their mother, Adriana Bosurgi; and that it belongs to plaintiff, for whom the defendants, Bosurgi, have been simply holding it in a fiduciary and custodial capacity. Thus, there is no genuine issue of fact in respect of title thereto.

The posture of the Chemical Bank is not realistic. We perceive no development whereby the Bank could possibly be prejudiced by this grant of summary judgment. Nor can the pending Federal actions and proceedings present any bar to the entry of summary judgment in favor of the plaintiff, as the tax liens, if valid, are not affected.

In any event, we find no impediment to this Court's determining an issue of fact competently before it, regardless of peripheral Federal questions. Venitron Corp. v. Benjamin, 440 F 2d 105 (2d Cir.), cert. den., 402 U.S. 987. And it is clearly so when the plaintiff herein has not been stayed by a Federal court order."

The Appellate Division ordered:

"It is unanimously ordered that the order so appealed from in so far as it (1) denied plaintiff's motion be and the same hereby is reversed, on the law, and the motion granted, and (2) denied defendant Ginsberg's cross-motion be and the same hereby is modified, on the law and the facts, and the cross-motion granted

> only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and without disbursements."

Because we did not wish to burden this Court and to avoid needless duplication of motions, ALAN C. KRIEGER, Esq., of my office, appeared for SAICI at the argument of Mr. GINSBERG's motion and requested, and Your Honor orally granted, an application staying the deposition of SAICI noticed by plaintiff pending the determination of Mr. GINSBERG's motion; the Court's order was embodied in a stipulation with plaintiff.

On November 14, 1973 Your Honor granted the GINSBERG motion holding:

> "The underlying cause of action herein is currently a matter of litigation in the New York State courts and a disposition there may aid this court in determining this case. The United States of America has effectively refused to do anything about the state court action and has pursued its remedy solely in this action. Since the government has permitted the state court action to reach such a point that attorney's fees are to be set, the requested protective order will be granted until such a determination has been made in the state court.
>
> So ordered."

The hearing ordered by the Appellate Division in the State Court matter was promptly noticed and held on

November 15, 1973 before Mr. Justice KAPELMAN at the Supreme Court, Bronx County. We appeared for SAICI, Mr. GINSBERG appeared pro se and CRAVATH, SWAIN & MOORE, Esqs., appeared on behalf of the CHEMICAL BANK NEW YORK TRUST COMPANY ("CHEMICAL BANK"). The government, although served with notice of the hearing, did not appear. Sworn testimony concerning Mr. GINSBERG'S fee was taken and at the conclusion thereof, on stipulation with this office, Mr. Justice KAPELMAN directed that an order and decree be settled in conformity with the decision of the Appellate Division adjudging that the funds which were and are the subject of the action by the BOSURGIS against the CHEMICAL BANK and the securities representing the same belong to and are the property of SAICI which the BOSURGIS held in fiduciary and custodial capacity for SAICI perforce of a trust created in 1954 between SAICI, EMILIO BOSURGI, LEONE BOSURGI and their mother, ADRIANA BOSURGI. The Court further fixed Mr. GINSBERG'S fee in the sum of $68,080.37 plus certain unpaid disbursements.

We immediately noticed a final order and decree so providing for settlement on November 21, 1973. A copy thereof is annexed as Ex.2. The attorneys for the CHEMICAL BANK proposed a counter-order and decree. Although neither judgment has been signed, I have been advised by Mr. Justice KAPELMAN that our proposed judgment will be signed as soon as the stenographic minutes of the aforesaid hearing are made available by the Court reporter and we will of course take such steps to see that it is

entered without delay.

After the hearing was held before Mr. Justice KAPELMAN we arranged a further stipulation with the plaintiff providing that SAICI's time "to comply with or move for a protective order with regard to the Notice of Deposition and Request for Production of Documents of plaintiff, UNITED STATES OF AMERICA, dated October 3, 1973, is extended up to and including December 14, 1973" because it was anticipated that the aforesaid order and decree would be signed by that time, which would be dispositive of the issues in this action, and that we would thus be able to promptly move for the final disposition of the fund held in escrow pursuant to Judge BONSAL's order and the termination of all actions and proceedings in this Court with respect thereto. Said stipulation was "SO ORDERED" by the Court on November 19, 1973.

Inasmuch as the order and decree expected momentarily from Mr. Justice KAPELMAN has not been signed and entered, and to avoid burdening this Court with an additional motion which appeared superfluous in view of Your Honor's decision in the GINSBERG motion granting him a stay until the State Court matter had been determined and thus

permitting the appropriate motion here, I called DAVID LAND, Esq., the Assistant United States Attorney handling this matter, and requested a further short adjournment to permit the decree to come down and assured him that the motion we anticipate making would be promptly brought on which we fully believe will abrogate the need for further proceedings in this action altogether and make the issue of the plaintiff's Notice moot.

Notwithstanding my desire not to prejudice the plaintiff in any way in respect of prior proceedings that have been had,or not had, in this action, I proposed the following stipulation to Mr. LAND over the telephone which was refused:

> "IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys that the time for the defendant, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES ("SAICI") to comply with or move for a protective order with regard to the notice of deposition and request for the production of documents of plaintiff, United States of America, dated October 3, 1973 or make any other motion in the premises, be and hereby is extended until Ten (10) days after the entry of the judgment substantially in the form of the copy which is hereto annexed which has already been submitted to Mr. Justice KAPELMAN for signature by the attorneys for SAICI who represent that they have been advised by the learned Court that such judgment would be promptly signed and said attorneys will accordingly cause said judgment to be entered immediately upon

ascertaining that it has been signed; and it is further

STIPULATED AND AGREED, that this stipulation is entirely without prejudice to the plaintiff with respect to any and all claims, if any, that the plaintiff may have with respect to any and all prior proceedings, steps or decrees hereto had or made herein."

Inasmuch as this sensible procedure was refused this application necessarily resulted.

I assure the Court that after the final decree in the State Court matter is entered which will occur shortly, as above noted, that we will promptly move for the final disposition of the fund held in escrow pursuant to Judge BONSAL's order and for the termination of the pending litigation and proceedings with respect to such fund that must necessarily follow. Inasmuch as this action has lain virtually dormant for over two (2) years on the part of the plaintiff, no possible prejudice can be claimed if discovery proceedings herein are stayed until our appropriate motion which will be expeditiously made can be brought before this Court for the disposition of the fund and the termination of all actions and proceedings in this Court with respect thereto.

As to the unchallengeable merit of our

position I quote the following from our Reply Brief to the Appellate Division in the aforesaid appeal:

" We preface our discussion with the following cogent holding in Aquilino v. United States, 363 U S 509, 4 L Ed 2d 1365:

> "The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach."

Continuing:

> "In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.' Morgan v Commissioner, 309 US 78, 82, 84 L Ed 585, 589, 60 S Ct 424." (4 L Ed 2d at p. 1368)

Cf. Superior Business Assistance Corp. v. United States, 461 F 2d 1026."

Continuing:

* * *

"The SAICI suit was instituted in June 1971. Manifestly in view of the pendency of the Bosurgi suit which involved the fund to which the SAICI case was directed, it logically and necessarily had to be brought in the same forum where the Bosurgi suit was still pending.

Copies of the summons and complaint and exhibits subsequently relied upon in support of our application

below were transmitted on June 16, 1971 to Michael I. Saltzman, Esq. the then Assistant United States Attorney; all counsel shortly thereafter attended the foregoing conference before Mr. Justice Kapelman on June 23, 1971. Since it was not possible to obtain concurrence of all counsel as to procedure, in which connection it is to be observed there was no means of transferring or compelling the transfer of the pending and undetermined Bosurgi suit to the federal court, and since the Government would not appear in the state court litigations, we proceeded with the SAICI action and made the application below for consolidation or concurrent consideration with the Bosurgi case and for summary judgment. The motion for summary judgment was initially returnable before Mr. Justice Silverman by whom it was referred to Mr. Justice Kapelman. Mr. Gottlieb noted in a letter to Assistant United States Attorney Saltzman dated November 24, 1971:

> "You evidently prefer that the matter be disposed of before Judge Bonsal. I think it fair to say from the beginning my position has been, as reflected in my letter to Judge Silverman, that I saw no need whatsoever on my part to indicate any preference as to Judge Bonsal, Judge Silverman or Judge Kapelman. In the intervening months you and all other counsel were certainly in a position to bring the issue as to venue and jurisdiction to a head by making some appropriate application--but none of you did so. You are now in a position, if you so desire, to make an application to throw the matter and the responsibility of deciding the issue as to venue and jurisdiction in the lap of Judge Bonsal; or, as I have suggested from the outset, try to resolve the matter by a sensible stipulation."

Further:

As the Court below noted (12) although Government counsel failed to appear in the state court actions it followed the like procedure held by this Court to be improper and which was rejected* of writing a letter "as amicus" in which, as Special Term pointed out:

> "The Government alleges without evidentiary proof that the Bosurgi Brothers control Sociedad". (12)

We replied by submitting documentary evidence under the aforesaid letter dated November 24, 1971 which we quote in anticipation that the Government will make an application to file a brief "as amicus":

> "I am certain it was not your purpose to accuse, or even suggest that this office was engaged in a dubious strategy to thwart the Government by suppression or concealment of any proprietary or stockholder interest on the part of the Bosurgis in the plaintiff Society. Here, too, it is unnecessary to argue what the effect would be upon the taxable liability claimed by the Government if Leone and Emilio Bosurgi, as well as the decedent Adriana Bosurgi, against whose estate, estate taxes solely are asserted, had a proprietary or stockholders interest in plaintiff Society. This office, before bringing the present action, was naturally interested in the same factor. I am enclosing, herewith, a photostat of a document in our possession in Spanish, signed by Juan Alberto Etcheverrito, Public Accountant, attested before a Notary Public, with a translation thereof certified by the American Vice Consul of Montevideo, Uraguay, in which it is stated that:

* Letter of David P. Land, Asst. United States Attorney dated September 14, 1973 to the Justices of this Court; letter of Joseph J. Lucchi, Deputy Clerk of this Court dated September 18, 1973 rejecting Mr. Land's letter with the direction that he "may apply for leave to file a brief amicus curiae on notice to the parties upon the appeal."

'a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial investments corporation), b) That they have not attended any meeting of the society, and c) That they have never occupied any office of director, nor they have discharged any executive office within the society, neither direct or through legal attorneys.'

After receipt of your letter of November 19, 1971, inquiry by this office did not develop anything to the contrary, nor was there anything that suggested that the information received by you is accurate. I, therefore, believe that in the same spirit of candor you will, in turn, submit to me a copy of any document verifying the information given you or let me know the source and nature thereof; so that I, in turn, may promptly check its accuracy. I will readily acknowledge, of course, that the Government has much better facilities and avenues of investigatory approach than this office has and hence I would welcome any advice received as to the authenticity of the information that, as aforesaid, was supplied to us. In the meantime, unless you indicate otherwise, I will endeavor to arrange the suggested meeting of counsel for all of the parties.

Please be good enough to let me hear from you at your reasonable convenience."

Obviously since as Mr. Ginsberg correctly asserts "the State Supreme Court where the earlier action was litigated is the only court that has the power to fix his attorney's fee" (12) removal of the case he brought and of that important issue to the Federal Court cannot be effected. Moreover, the learned Court below, we respectfully submit, misconstrued the case of Vernitron v. Benjamin, 440 F. 2d 105 (2nd cir.), cert. den. 402 U S 987, 29 L Ed 2d 152. That case did not turn upon the parties involved but upon the issues involved. The Federal Court of Appeals made that clear by saying in the language quoted in our main brief (p.14) that:

> "[t]here is no reason why the state court cannot or should not determine issues of fact and state law relevant thereto as they come up in the state litigation",

> "[i]t is not sufficient to show that the matter properly before a state court embraces issues within the compass of the federal suit, even if the federal court has exclusive jurisdiction over its case." (p.108)

Here, it is patent that the question of title as the Supreme Court has held in Aquilino, supra, is controlled by state law and the applicability of the Government's asserted tax lien is controlled by the issue of title to the fund which is determinable under state law (Aquilino, supra)."

As already noted, p.3 supra, the Appellate Division found "no impediment" to the state court's "determining an issue of fact competently before it, regardless of peripheral federal questions" citing Vernitron, supra.

Furthermore, the plaintiff's Notice served on SAICI should itself be stricken. As demonstrated in the annexed memorandum of law if the plaintiff desires to take SAICI's deposition by its employee or officer having knowledge of the facts it will have to do so at defendant's principal place of business, to wit, Montevideo, Uruguay. Additionally, plaintiff's request, embodied in its notice that SAICI produce from Uruguay "all of its books and records, correspondence, contracts, agreements, drafts, notes, vouchers, invoices, and other written records, or copies thereof, in the possession of SAICI, relating to its claim in this action" is also palpably improper, not sufficiently specific and should be stricken as matter of law.

Copies of the pleadings in the State Court and all the documents upon which SAICI's claim was based were, as aforesaid, transmitted to MICHAEL I. SALTZMAN, Esq., the Assistant United States Attorney, then handling the matter on June 16, 1971. On October 20, 1972, I had a conference with LEON HART, Esq., of the Appellate Division of the taxing authorities, in a vain attempt to reach a disposition of the matter. Mr. HART requested copies of our papers and I sent them to him under cover of letter that same day stating:

> "Pursuant to our discussion this morning, we enclose as agreed, two copies of our motion for summary judgment in New York State Supreme Court and copies of the pleadings in the proceedings in the United States District Court.
>
> A copy of our papers is also being delivered to Mr. Kostelanitz' office. Indeed, as the attached copy of a letter of transmittal to his office dated one year ago reflects, and as I stated at our meeting, all parties were advised of these proceedings and furnished copies of these papers at the outset.
>
> I trust that you will review the enclosures and inform us at your earliest possible convenience whether or not a further meeting is advisable."

I heard nothing until I was informed months later that his office would do nothing inasmuch as the

plaintiff herein had already commenced this action. Plaintiff has had these papers now for more than thirty (30) months and has not demonstrated in the slightest anything to support its claim that funds and securities on deposit at the CHEMICAL BANK are the property of and belong to anyone other than SAICI.

I regret that after almost an hour of telephone discussion with Mr. LAND to whom I read the foregoing stipulation which I dictated to my secretary right there that this learned Court and the parties must be burdened with an application of this character, rather than the contemplated motion which we itend to and necessarily will promptly make, as aforesaid, immediately upon the signing and entry of Mr. Justice KAPELMAN's final decree.

W H E R E F O R E, it is respectfully requested that the order to show cause hereto annexed be signed and that the application be in all respects granted.

S/
Samuel Gottlieb

SWORN TO BEFORE ME THIS
13TH DAY OF DECEMBER, 1973.

Notary Public

ALAN C. KRIEGER
NOTARY PUBLIC, State of New York
No. 60-2202800
Qualified in Westchester County
Commission Expires March 30, 19 75

EXHIBIT 1 ANNEXED TO FOREGOING AFFIDAVIT IS

REPRODUCED IN THIS APPENDIX AT PAGE A-147

- -

EXHIBIT 2 ANNEXED TO THE FOREGOING AFFIDAVIT IS

REPRODUCED IN THIS APPENDIX AT PAGE A-258

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

71 CIV.928 (KTD)

-against-

LEONE BOSURGI, et al.,

Defendants.

APPLICATION ON BEHALF OF DEFENDANT SAICI FOR SUMMARY JUDGMENT.

----------X

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of SAMUEL GOTTLIEB, Esq., sworn to the 18th day of January, 1974, and upon the exhibits annexed and therein referred to, and upon the Order of the Appellate Division of the Supreme Court, State of New York, First Judicial Department, dated November 8, 1973 heretofore annexed as Exhibit "C", and a copy of the Record on Appeal upon which said Order was made and entered, and upon all the proceedings heretofore had herein, and in conformity with the proceedings had before this learned Court on December 20, 1973, the undersigned moves and submits this application on behalf of the defendant, SAICI, for summary judgment dismissing the complaint herein as against said defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure and for such other and further relief as to the Court may be deemed proper in the premises.

Dated, New York, N.Y.
January 21, 1974

Yours, etc.,

GAINSBURG, GOTTLIEB, LEVITAN & COLE

By _____
~~A Member~~ of the Firm
Attorneys For Defendant
Sociedad Anonima De
Inversiones Commerciales E
Industriales

TO:

BENEDICT GINSBERG, ESQ.
Attorney for Defendants
Leone and Emilio Bosurgi
475 Fifth Avenue
New York, New York 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, New York 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, New York 10005

(44)

A 218

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and BENEDICT GINSBERG,

Defendants,

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, and W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,

Third-Party Defendants.

- x

MOVING AFFIDAVIT
of
SAMUEL GOTTLIEB

71 Civ. 928

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL GOTTLIEB, being duly sworn, deposes and says:

I am a member of the firm of GAINSBURG, GOTTLIEB, LEVITAN & COLE, attorneys for the defendant above named, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES ("SAICI") and submit this affidavit in support of said defendant's motion for summary judgment in conformity with the proceedings had before this learned Court on December 20, 1973. As indicated in plaintiff's brief submitted at the aforesaid hearing:

> "This action by the United States of America was commenced on March 3, 1971 to obtain a judgment for the unpaid federal estate taxes of Adriana Bosurgi* against Leone Bosurgi, Emilio Bosurgi and Chemical Bank. The action also sought to foreclose on the property of the Bosurgis in satisfaction of the estate tax liens." (pp.1,2)

It is noteworthy that the tax lien here asserted involves estate taxes solely, the tax liability with respect to which allegedly stems from the death of ADRIANA BOSURGI, a non-resident alien who died on March 27, 1963; the lien is specifically sought to be impressed

(*) All emphasis supplied unless otherwise indicated.

against a fund of $215,000.00 now represented by securities held in escrow by BENEDICT GINSBERG, Esq., one of the defendants herein, as hereinafter specified.

Concededly "[t]his $215,000 sum was the settlement proceeds of an action commenced in 1966 entitled Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Company (Sup. Ct. N.Y. Co. No. 7939/66) in which Chemical Bank agreed to pay the Bosurgis the sum of $215,000." (id.p2) The manner in which said fund came into being is of controlling significance. In December of 1966 BENEDICT GINSBERG, Esq. was retained by LEONE BOSURGI and EMILIO BOSURGI to institute suit against the CHEMICAL BANK NEW YORK TRUST COMPANY ("CHEMICAL BANK") to recover damages because the Bank allegedly had converted to its own use 5,200 shares of stock owned by Messrs. BOSURGI and held by the Bank as custodian. The action was instituted in the Supreme Court of the State of New York by said LEONE BOSURGI and EMILIO BOSURGI as sole plaintiffs who alleged, among other things, that the CHEMICAL BANK improperly applied the stock as collateral for a loan which it made to third parties resulting in a complete loss. As MR. GINSBERG points out in an affidavit heretofore submitted herein CHEMICAL BANK claimed that "it was authorized, not by the Messrs. BOSURGI but by a prospective

borrower, to use the stock of the Messrs. BOSURGI as collateral for a loan to the borrower, who had allegedly represented to CHEMICAL BANK that one of the Messrs. BOSURGI had orally given the borrower his consent to use the stock as collateral, and had orally authorized the borrower so to inform the Bank."

After numerous preliminary proceedings the case came on for trial before Mr. Justice KAPELMAN in the Supreme Court of New York County. At an all-day conference held before Mr. Justice KAPELMAN, a settlement was arrived at pursuant to a stipulation dictated into the record September 15, 1970 which, among other things, provided that "the action is settled for the sum of $215,000.00 to be paid within ten days from the date hereof"by the Bank upon the terms and conditions therein set forth. The stipulation of settlement placed upon the record provided that in the event of any dispute or difference of opinion with respect to the terms thereof or the manner of effecting the same or the obligation of the BOSURGIs' attorney [BENEDICT GINSBERG,Esq.] with respect to the settlement fund of $215,000.00 placed in escrow with him, such issue or issues were to be referred to Mr. Justice KAPELMAN "for determination

by him as an arbitrator."

The action and proceedings before Mr. Justice KAPELMAN were still pending in the foregoing incomplete posture when my firm was retained to bring suit on behalf of SAICI claiming ownership of the settlement proceeds. We were constrained to bring such action as hereinafter indicated in the Supreme Court, New York County, in June 1971. SAICI, in its complaint demanded the following relief:

> "WHEREFORE, plaintiff demands judgment decreeing that:
>
> 1. (a) the funds which were the subject of the law suit commenced by Leone Bosurgi and Emilio Bosurgi against the Chemical Bank in the Supreme Court, New York County (Index No. 7939/1966) were funds which had been held by the parties to said law suit in 'fiduciary administration' for and on behalf of plaintiff;
>
> (b) the amounts paid in settlement of said claim is the property of and accountable to plaintiff;
>
> (c) the said $215,000 and any increments thereof held in escrow by Benedict Ginsberg, Esq. constitutes the property of plaintiff and directing that said escrowee pay to plaintiff said escrow fund."

Before the service of process I advised Mr. GINSBERG of the action I proposed to bring and wrote to him on June 2, 1971:

> "I am certain, on further reflection, that your conclusion, as was mine, that in the present context no beneficial purpose can be served by commencing the action through attachment with the concomitant needless and impractical expense involved in the cost of the undertaking and Sheriff's poundage fees where the Sheriff, in view of the aforesaid Court order, can not do more than simply serve the order of attachment. Authority on your part to accept service of the summons and complaint and a simple stipulation between us governing the disposition of the funds in escrow along similar lines to the foregoing order, can effectively serve everyone's purpose and yet at the same time avoid needless expense and proceedings; especially since the documentary showing in support of our order, as we have been advised, is sufficient to have the attachment issue upon the mere filing of the undertaking.
>
> Please be good enough to give this your immediate consideration and attention, because obviously time is of the essence."

Mr. GINSBERG promptly advised Mr. Justice KAPELMAN of SAICI's proposed lawsuit and in his communication to the Court wrote that:

> "The gravamen of that action is that the moneys which Chemical Bank had originally received from my clients, and which the bank claims were the moneys of my clients' late mother, were at all times trust funds, held by her for the account of S.A.I.C.I.

Documents allegedly supporting that contention were attached to and quoted in the summons and complaint served upon me, and the affidavit in support of a warrant of attachment.

I have not yet received authority to appear for my clients in the S.A.I.C.I. case, but I would like to have my fees fixed and paid. It is now almost nine months since the case was settled in your Honor's Chambers.

May I therefore respectfully request that your Honor see counsel, in your capacity as arbitrator, for the purpose of fixing my fee and directing payment, subject to the order of the Federal Court as to the disbursing of the sum which I hold in escrow."

A conference was then held on June 23, 1971 before Mr. Justice KAPELMAN at which there were present MICHAEL I. SALTZMAN, Esq., Assistant United States Attorney, JOHN A. LUCIDO, Esq., of the firm CRAVATH, SWAINE & MOORE, representing CHEMICAL BANK, BENEDICT GINSBERG, Esq. and I. On the following day, June 24, 1971, I sent a communication to Mr. GINSBERG, a copy of which was hand delivered to all concerned as well as to Mr. Justice KAPELMAN (Ex. A hereto annexed). In that communication I wrote:

"As requested at the conference held yesterday afternoon before Mr. Justice Kapelman this letter is being sent to all counsel and to the Court stating the position of our client, S.A.I.C.I."

After quoting from my foregoing letter of June 2,

1971, I continued:

> "My letter concluded by asking that you give the matter your immediate attention and that if service is accepted and there is an appearance 'we will decide promptly how and in what manner the taxing authorities should be vouched in or what proceedings should be initiated so that all conflicting claims in respect of the escrow fund be resolved' and that 'would necessarily include the Chemical Bank.' Suffice it to say, after acknowledging my letter, you did obtain the necessary authorization, served a notice of appearance and obtained an extension of time to answer."

My letter than specifically referred to the fact that MICHAEL I. SALTZMAN, Esq., Assistant U.S. Attorney and counsel for the Bank, were being furnished with copies of the summons and complaint, proposed order of attachment, the affidavits and exhibits in the SAICI case.

> "Subsequently on June 16, 1971 Michael I. Saltzman, Esq., Assistant United States Attorney, in a telephone talk with me asked that I send him a copy of the summons and complaint, our proposed order of attachment and the affidavits and exhibits annexed thereto in the aforementioned law suit instituted by this office. At yesterday's conference, I stated that copies of those papers would likewise be furnished to counsel for the Chemical Bank which will be done together with a copy of this communication."

My communication then continued:

> "It is our position:
>
> 1. That the law suit we have begun and in which there is presented substantial

documentary proof in support of the issue raised by plaintiff, claiming title to the funds here involved, should be consolidated or in any event heard and considered concurrently with the proceedings now pending before Mr. Justice Kapelman in the first of the above entitled actions.

2. Unless the issue raised as to the title of these funds is initially and promptly determined we contend there will exist no valid or legal basis for Mr. Justice Kapelman to make a complete and final determination of this matter.

3. Our request for a consent to consolidation or, in the alternative, for a concurrent consideration of the issue raised as to title with the pending proceedings is primarily designed to enable the most expeditious disposition of the determination of the conflicting rights and interests.

4. As stated by me before Mr. Justice Kapelman, we recognize that you are entitled to compensation for the services rendered against the Chemical Bank and in the related proceedings resulting in the escrow fund (represented by the certificates of deposit) now being in your possession. I repeat here what was stated in that regard by me at the foregoing conference that in fairness our client must recognize that upon succeeding in proving title to the escrow funds your services will, of course, have been to our client's decided benefit. You claim that your legal fee is predicated upon a written retainer with your client which you advised Mr. Justice Kapelman at the conference, entitled you to $17,000. plus 40% of the amount recovered by way of settlement. In response to the Court's statement that a retainer agreement is subject to judicial review and evaluation, your position was that that may be done at the

client's instance and that here there was no objection by your client. However, your written retainer arrangement made with your client, the Bosurgis, is not binding upon our client. I, of course, recognize that we have no standing before Mr. Justice Kapelman in those proceedings unless our client's claim of title is first established. It was for that very reason that consolidation or concurrent hearing was and is proposed by me to expedite matters."

My letter further made it clear that in the then posture of the proceedings our client's claim of title necessarily must be considered and disposed of in connection with the issue of Mr. GINSBERG's counsel fee claim and pointed out in specific detail how and why that could be expeditiously done:

"5. You repeated your contention, before Mr. Justice Kapelman that you had advanced, in opposing the attempt of the Chemical Bank to interpose a cross or counterclaim against your client, the Bosurgis, that the determination of your pending litigation by settlement was a bar notwithstanding the pendency of the proceedings involving your fee allowance. Although I may not concur in that view, it is needless, at this stage, for me to challenge it because viewed from every standpoint, our client's claim of title, as above noted, necessarily must be considered and disposed of by Mr. Justice Kapelman in connection with your claim of counsel fees under the aforesaid retainer. I repeat, if consolidation or concurrent hearing are not consented to, the application in our client's behalf will simply take the form that our client be authorized to appear

in your proceeding on the legal fee issue, as claimant to ownership of these escrow funds so that such issue can be quickly, fully, effectively and finally determined. Since the Chemical Bank and government counsel have been alerted to the foregoing, I assume that Mr. Justice Kapelman will require, in the absence or failure of the consent requested, that notice of our application be given to the bank and government counsel so that they may take such steps in respect thereof as may be deemed appropriate.

6. As I advised you in the foregoing conference, it is our position that the stipulation placed upon the record in your law suit on September 15, 1970 by you and the Cravath firm, to the effect that any dispute, difference of opinion or issue pertaining to the settlement thereby made (which includes the issue as to legal fees) is to be determined by Mr. Justice Kapelman 'as an arbitrator' is invalid and erroneous in so providing. In fairness, it must be added, that Mr. Justice Kapelman, at our conference, was quick to recognize the inappropriateness of the use of the term 'arbitrator' and appropriately observed that in this instance it was a matter of semantics. No one expressed any dissent in that regard. Accordingly, I repeat, on behalf of the client we represent, that correction be made as to the term 'arbitrator' so that Mr. Justice Kapelman may dispose of these issues, as was clearly intended, in quick and summary fashion either by conventional hearing or under Simplified Procedure. It is unnecessary, therefore, in this connection to do no more than cite the cases indicating that a Supreme Court Judge may not serve as 'arbitrator' even upon the consent of counsel and the clients (Matter of Bernarr Macfadden v. Felix C. Benvenga, 290 N Y 568, Matter of Jacobs v. Steinbrink, 242 App Div 197, 1466 Realty Co. v. Baum, 38 Misc 2d 209).

7. Finally, it must be emphasized here, as I did at the conference, that the course suggested in no respect is in conflict or contravenes the order of Judge Bonsal. I again direct attention to Vernitron Corp. et al v. Benjamin, 440 F. 2d 105 (2 Cir. Mar. 5, 1971). That authority renders it clear beyond dispute that the question of title to these funds raised by our client can only be decided in the proceeding pending in our state courts. Manifestly, Judge Bonsal cannot undertake to decide your claim as to legal fees and your rights asserted on the basis of your retainer with the Bosurgis which my client, as I asserted at the conference and repeat here, has the right to challenge as the owner of the funds held by you in escrow. Of course, if the issue as to title is resolved in our client's favor it will dispose of the tax claim asserted by the government against the Bosurgis. However, that, under the decision in Vernitron Corp., does not furnish any basis for interposition or restraint as to these state court proceedings because, as the federal court of appeals held:

> '[i]t is not sufficient to show that the matter properly before a state court embraces issues within the compass of the federal suit, even if the federal court has exclusive jurisdiction over its case.'(p.108)

Moreover, '[t]here is no reason why the state court cannot or should not determine issues of fact and state law relevant thereto as they come up in the state litigation', and of controlling importance is the further ruling of the court of appeals that '[t]he subsequent effect of collateral estoppel, far from requiring the federal court to stay proceedings in the state court, is a result which should be welcomed to avoid the task of reconsidering issues which have already been settled by another competent tribunal.' (p.108)

> That Mr. Justice Kapelman necessarily should and as I urged, must determine the issue of title to these funds in the pending proceedings, under the foregoing authority is unavoidable. As I advised the Court at the foregoing conference and government counsel that upon success in establishing title in our client, our right as a claimant under Judge Bonsal's order would perforce be incontestably established under the authority of Vernitron Corp. supra."

My letter concluded:

> "On the basis of the foregoing, I urge that this office be immediately advised as to whether the requested consent for the consolidation or for a concurrent hearing on the issue of title in the pending proceedings will be forthcoming. If not, I propose to move for appropriate relief to that end as heretofore indicated."

Since no consent was forthcoming,as above requested, on October 12, 1971, a motion was made in the SAICI case returnable November 4, 1971:

> "that an order be made and entered herein consolidating the above-entitled action with the action in this Court entitled Leone Bosurgi and Emilio Bosurgi, Plaintiffs, against Chemical Bank New York Trust Company, Defendant, Index No. 7939/66, or directing that concurrent consideration be given as to the issue herein raised with respect to title of the fund here involved with matters now pending before Mr. Justice KAPELMAN in the foregoing action pertaining to and involving said fund and the claim of Benedict Ginsberg, Esq. for an award of counsel fees to be paid out of said fund and directing that summary

judgment be granted in favor of plaintiff above named against the defendants above named pursuant to Rule 3212 of the Civil Practice Law and Rules, upon the ground that there are no triable issues of fact and that there are no defenses to plaintiff's cause of action and that plaintiff is entitled to summary judgment as a matter of law,"

Mr. Ginsberg served a cross-motion:

"for an order fixing the fee of the defendant Benedict Ginsberg and authorizing him to retain out of the monies now held by him in escrow the sum of $78,800.19, plus 40% of the interest and increment accruing on the sum of $215,000.00 heretofore delivered to him in escrow and subject to the order of the United States District Court for the Southern District of New York,"

Copies of the motion papers were served upon BENEDICT GINSBERG, Esq., attorney for the BOSURGIs, CRAVATH, SWAINE & MOORE, Esqs., attorneys for the CHEMICAL BANK and the U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK.

The motions appeared on the calendar in the New York Supreme Court at the motion term presided over by Mr. Justice SILVERMAN. On November 5, 1971 I wrote Mr. Justice SILVERMAN:

"I enclose a copy of my letter of even date herewith addressed to Michael I. Saltzman, Esq., Assistant United States Attorney for the Southern District of New York, which is being delivered by hand to all counsel in this matter and Mr. Justice Kapelman setting forth why, in the present posture of this matter, we consider it an absolute necessity, not a matter of choice between three such eminent and respected Judges as yourself, Mr. Justice Kapelman and Judge Bonsal, to request that the matter be referred to Mr. Justice Kapelman for determination."

In the letter to Mr. SALTZMAN, above referred to, I stated:

> "To remove any possible doubt, my request for consolidation with the proceedings in the action as to which Mr. Justice Kapelman already has jurisdiction, is not dictated by choice or preference but, as I regard it, by necessity and propriety. All I ask you to do is to indicate how it is possible to have an effective and expeditious and complete disposition in any other court or before any other judge and I will readily stipulate that such procedure be adopted as to which, I repeat, all counsel up until the present time have been completely silent. Also be good enough to let me know upon what basis federal jurisdiction can be stipulated on an issue of title purely cognizable in the state court."

I concluded:

> "I think we would be better off by endeavoring to reach a stipulation as to the most effective procedural course to be pursued, rather than engage in forensic combat such as this."

Suffice it to say that no stipulation could be achieved and the motions were referred by Mr. Justice SILVERMAN to Mr. Justice KAPELMAN for consideration and determination on its merits.

Since the full record subsequently presented to the Appellate Division will be submitted herewith we quote the following portion of the opinion of Mr. Justice KAPELMAN:

> "It appears evident that this motion is to force the expenditious disposition of the determination of conflicting interests:
>
> <u>The Government alleges without eviden-</u>

tiary proof that the Bosurgi Brothers control Sociedad. The Government maintains that the most expeditious manner of disposing of the issues is to litigate the title to the fund in the Federal Court.

Ginsberg maintains that the State Supreme Court, where the earlier action was litigated, is the only court that has the power to fix his attorney fees.

Sociedad argues that the question of title to the fund could only be decided in the State court and cites Vernitron Corp. et al. v. Benjamin, 440 F. 2d 105 (2nd,CCA).

In the court's view Vernitron, supra, is not dispositive herein. The Federal court action was instituted prior in time to Sociedad's action. In Vernitron the parties were the same in both courts. The Government is not a party in the State action and the judgment in the State court would not affect the action in the Federal court. Furthermore, the existing restraining order of the Federal court prevents disposition of the fund.

As to the attorney's liens, Internal Revenue Code 7323(b)(8) protects such lien in reasonable amount.

There are procedural stumbling blocks which affect proper disposition of the matter. The motion for summary judgment and cross motion are not ripe for determination of rights respecting the fund. The motion and cross motion are denied without prejudice."

An order on the foregoing opinion was made and entered on August 21, 1972. SAICI served its notice of appeal on August 23, 1972 as did BENEDICT GINSBERG, Esq. from the denial of his aforesaid cross-motion.

On October 20, 1972, I and my associate, Mr. KRIEGER, held a conference with LEON HART, Esq., counsel in charge of the matter at the Appellate Division of the Internal Revenue Service. The conference had been set up by the office of BORIS KOSTELANETZ, Esq., who had previously been handling the matter with the I.R.S.

After a lengthy conference with a view towards reaching a possible accord in which I referred specifically to the conclusive documentary proof that we had in our possession on the issue of title and that had been presented on our motion for summary judgment in the aforesaid State Court litigation, I sent the following communication to Mr. Hart that very day.

> "Pursuant to our discussion this morning, we enclose as agreed, two copies of our motion for summary judgment in New York State Supreme Court and copies of the pleadings in the proceedings in the United States District Court.
>
> A copy of our papers is also being delivered to Mr. Kostelanetz' office. Indeed, as the attached copy of a letter of transmittal to his office dated one year ago reflects, and as I stated at our meeting, all parties were advised of these proceedings and furnished copies of these papers at the outset.

I trust that you will review the enclosures and inform us at your earliest possible convenience whether or not a further meeting is advisable."

Thereafter, on December 15, 1972, I again wrote to Mr. Hart. This learned Court will note how fully governmental counsel were kept advised as to every phase of this matter, both factually and procedurally.

"On October 20, 1972, we sent as per understanding reached at the conference with you that day, two copies of our motion for summary judgment in the New York State Supreme Court and copies of the pleadings in the proceedings in the U.S. District Court. In my letter I said 'I trust that you will review the enclosures and inform us at your earliest possible convenience whether or not a further meeting is advisable.' No word at all has been forthcoming either from you or from Miss Weston, your associate counsel. I have been advised by Mr. Kostelanetz's office to like effect.

"As far back as November 24, 1971 in a communication to Michael I. Saltzman, Esq., Assistant United States Attorney, I wrote:

'I am enclosing, herewith, a photostat of a document in our possession in Spanish, signed by Juan Alberto Etcheverrito, Public Accountant, attested before a Notary Public, with a translation thereof certified by the American Vice Consul of Montevideo, Uraguay, in which it is

stated that:

> '(a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial Investments Corporation); (b) That they have not attended any meeting of the Society; and (c) That they have never occupied any office of director, nor they have discharged any executive office within the Society neither direct or through legal attorneys.'

'After receipt of your letter of November 19, 1971, inquiry by this office did not develop anything to the contrary, nor was there anything that suggested that the information received by you is accurate. I, therefore, believe that in the same spirit of candor you will, in turn, submit to me a copy of any document verifying the information given you or let me know the source and nature thereof; so that I, in turn, may promptly check its accuracy. I will readily acknowledge, of course, that the Government has much better facilities and avenues of investigatory approach than this office has and hence I would welcome any advice received as to the authenticity of the information that, as aforesaid, was supplied to us.'

"In a letter to Mr. Justice Kapelman, dated February 2, 1972, vested with jurisdiction in the New York State Supreme Court proceedings, I stated:

> 'It is important that your Honor be brought up to date as to what has occurred following the exchange of correspondence between Michael I. Saltzman, Esq., Assistant United States Attorney, and myself, dated November 5, November 12, November 19, November 24, 1971,

copies of which were submitted to your Honor.

Your Honor will note that in my letter of November 24, 1971, among other things, I invited the Government, 'in the same spirit of candor' displayed by this office, to exchange or supply any information contrary to the documentary matter that has been submitted.'

"In that same letter it was further stated:

'Parenthetically, it should be added that before argument, Mr. Saltzman and I agreed to meet in further conference to find a solution as to the problems involved; and after argument before Judge Weinfeld, my associate Mr. Krieger and I went to Mr. Saltzman's office and actually had such conference. He advised us that he was unable to get in touch with the representative of the Appellate Division of I.R.S., whose presence was essential in connection with negotiations for any possible disposition. We heard nothing from Mr. Saltzman thereafter in that connection.'

" My letter prophetically concluded:

'I still anticipate that a conference necessarily must ensue at which a general effort will be made to try for some over-all solution. I am awaiting word from Mr. Saltzman as to whether he has heard from counsel with whom he was in contact at the Appellate Division of I.R.S.'

"Thus, at this late date, we reach the same dead end.

"In our conference of October 20, 1972, you were advised about our appeal to the Appellate

Division of the Supreme Court First Department from the order of Mr. Justice Kapelman denying summary judgment. We said we would defer perfecting the appeal pending your review and reaction to the papers that you requested copies of, and which we rushed to your office that very day.

"Accordingly, we are left with no other recourse but to proceed with the appeal which we will endeavor to bring on for argument as quickly as can be done when the Court resumes its session after the first of the year."

Thereafter, I received a telephone call from Mr. Hart who advised me that he would undertake to do nothing until the issue of title was judicially determined. The record on the aforesaid appeals from Mr. Justice KAPELMAN's determination was then perfected and the appeals brought on for argument at the Appellate Division of the New York State Supreme Court in the First Judicial Department. This learned Court will note from the copy of the record on appeal, herewith submitted, that notices of appeal, ours and Mr. GINSBERG's, were served upon the UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NE YORK. The obvious reason for doing so was because the government took the laboring oar before Mr. Justice KAPELMAN who, as aforesaid, noted in his opinion that "The government alleges without evidentiary proof that the BOSURGI Brothers control SOCIEDAD".

It should be emphasized at this point that no application was made by the government for a stay of the proceedings before Mr. Justice KAPELMAN or to stay the appellate proceedings. On the contrary, DAVID P. LAND, Esq., Assistant United States Attorney, in a letter dated September 14, 1973 to the Justices of the Appellate Division, First Department, after asserting that he was "writing as amicus to the Court" did "respectfully urge that the orders appealed from be affirmed."

It is not necessary to treat with the reasons set forth in counsel's letter because the communication so sent was returned by the Appellate Division to government counsel with the advice that he could "apply for leave to file a brief amicus curiae on notice to the parties upon the appeal." That was not done.

On November 8, 1973, the unanimous Appellate Division rendered the following opinion which has not, as yet, been reported in the Official Advance Sheets but which has already been reported in the New York Supplement Advance Sheets of December 25, 1973, 349 N.Y.S. 2d 75:

> "PER CURIAM.
> Order, Supreme Court, New York County, entered on August 22, 1972, insofar as it denied plaintiff's motion for an order of consolidation or concurrent consideration and for summary judgment, unanimously reversed, on the law, and said order, insofar as it denied the cross-motion of defendant Benedict Ginsberg, Esq., unanimously modified, on the law and the facts, and the

cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and without disbursements.

[1] The main motion for summary judgment is meritorious. The documentary evidence submitted on the motion, conceded to be 'genuine and authentic', conclusively demonstrates that the fund in question represented the proceeds of a trust established in writing, December 10, 1954, between plaintiff and the Bosurgi defendants and their mother, Adriana Bosurgi; and that it belongs to plaintiff, for whom the defendants, Bosurgi, have been simply holding it in a fiduciary and custodial capacity. Thus, there is no genuine issue of fact in respect of title thereto.

[2] The posture of the Chemical Bank is not realistic. We perceive no development whereby the Bank could possible be prejudiced by this grant of summary judgment. Nor can the pending Federal actions and proceedings present any bar to the entry of summary judgment in favor of the plaintiff, as the tax liens, if valid, are not affected.

[3] In any event, we find no impediment to this Court's determining an issue of fact competently before it, regardless of peripheral Federal questions. Venitron Corp v. Benjamin, 440 F.2d 105 (2d Cir.), cert. den., 402 U.S.987, 91 S.Ct. 1664, 29 L.Ed. 2d 154. And it is clearly so when the plaintiff herein has not been stayed by a Federal Court order." (pp.76-77)*

The government proceeds on the erroneous premise that because it was conceded and unchallenged that the "documentary evidence submitted" on our motion for summary judgment was "genuine and authentic" that SAICI's state court litigation was not an adversary proceeding and that the judgment ultimately rendered therein was in effect a

* The order of the Appellate Division is hereto annexed as Exhibit "C"

stipulated default judgment without efficacy so far as the government was concerned. Nothing could be farther from the truth. The documentary evidence which as the Appellate Division noted in the foregoing opinion was concededly genuine and authentic and hence conclusively demonstrated that the fund, here in suit "belongs to plaintiff" and accordingly there was "no genuine issue of fact in respect of title thereto,"at the very inception of SAICI's state court litigation was made available to MICHAEL I. SALTZMAN, Esq., Assistant United States Attorney, on June 16, 1971, as well as to counsel for the CHEMICAL BANK and to BENEDICT GINSBERG, Esq., counsel for the BOSURGIs (pp6-13, supra).

Indeed, in my affidavit in support of our aforesaid application for summary judgment I stated that:

> "In order to avoid 'needless expenditure of time and an unnecessary expense to undertake the depositions' of defendants or to seek the issuance of 'a Commission or Letters Rogatory,' all of these foregoing exhibits were submitted by deponent to defendants' counsel under cover of letter dated August 5, 1971, 'to confirm the authenticity and genuineness of the documents and signatures of your clients, of which we have submitted these photostats, and the exactness of the photostats themselves and their translations.' Defendant Benedict Ginsburg, Esq. thereupon, by letter dated September 14, 1971, acknowledged the

genuineness and authenticity of the exhibits, stating:

'Dear Sir: I returned for Europe last week, where I conferred with Mr. Leone Bosurgi and his personal attorney concerning the genuineness and authenticity of the documents which you forwarded to me with your letter of August 5. As a result of that conference, I am authorized to inform you that...'they are true copies of the originals and they were duly executed by the persons whose signatures appear thereon, and the English translations thereof are true and accurate'. (Emphasis added)

A copy of plaintiff's letter requesting such acknowledgment and defendants' admission are annexed hereto as Exhibits 10 and 11, respectively."

As heretofore indicated it must be emphatically reiterated that our summary judgment application containing the foregoing was served upon government counsel as well as counsel for the Bank as far back as October, 1971 (p.13, supra). It is fair to add that Mr. GINSBERG, whose letter I quoted, is a reputable and responsible lawyer who is presently serving on the Grievance Committee of the Association of the Bar of the City of New York and, for many years, has served on the Judiciary Committee of the Association. I had no reason to doubt, nor is there anything in the record before the Appellate Division which suggests, nor has there been a scintilla of fact presented throughout the intervening years upon the basis of which the

concession as to "the genuineness and authenticity of the documents" upon which summary judgment was granted at the Appellate Division can be questioned or challenged.

This learned Court is respectfully requested to bear in mind that on October 20,1972,after the conference with LEON HART, Esq., counsel in charge of the Appellate Division of the Internal Revenue Service "two copies of our motion for summary judgment" were then sent to him containing all of the documentary evidence relied on. Thereafter, on December 15, 1972, in a further communication to Mr. HART, I referred to the document sent to MICHAEL I. SALTZMAN, Esq., United States Attorney "as far back as November 24, 1971".which specified that the BOSURGIs "never occupied any office of director, nor they have discharged any executive office within the Society [SAICI] neither direct or through legal attorneys" and that I had requested "that in the same spirit of candor" that counsel submit to me "a copy of any document verifying the information given you" to the contrary "or let me know the source and nature thereof;so that I in turn may promptly check its accuracy." I then readily acknowledged "that the government has much better facilities and avenues of investigatory approach

than this office has and hence I would welcome any advice received as to the authenticity of the information that, as aforesaid, was supplied to us" (pp.17-18, supra). Nothing whatever was heard from either branch of the government or counsel throughout all of these years.

Mr. Justice KAPELMAN, as heretofore shown, denied our summary judgment application because "[t]he government alleges without evidentiary proof that the BOSURGI brothers control Sociedad"(pp.14-15). The same procedure was unsuccessfully pursued by the government when the appeal came on for argument.

Pursuant to the order of reversal of the Appellate Division directing "a hearing to determine the fixation of fees" Mr. GINSBERG duly served notice of hearing upon all counsel including the UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK. Indeed, to paraphrase and quote FRIENDLY, J. in Phillips Nizer v. Lewis S. Rosenstiel -- F. 2d -- (decided Dec. 10, 1973; see: NYLJ, front page December 11,1973), "[s]urely, the court [Mr. Justice KAPELMAN] in which" all of the foregoing proceedings were had was "in a far better position to determine reasonable compensation" for the

services rendered by Mr. GINSBERG "than another tribunal which comes to the case cold." (Phillips Nizer, supra, NYLJ at p.6.)

The foregoing hearing was held before Mr. Justice KAPELMAN on November 15, 1973. In the course of that proceeding,the minutes of which will be made available if this Court so desires, I stated:

> "Once the issue of title was determined in our favor, as your Honor properly points out, the only remaining issue was the issue as to the allowance of legal fees. In my statement to the Appellate Division, it is recurrent in my brief, the only judge that is cognizant about the services that this case entailed was the judge before whom the settlement was negotiated and before whom it was approved."
> (Min. Proc, KAPELMAN, J. Nov.15'73,p.28)

Mr. GINSBERG took the witness stand and placed upon the record the legal services rendered by him and asserted that their value was in excess of that provided for in his written retainer. (Min. Proc. KAPELMAN J. Nov.15 '73, pp.35-49) I had previously pointed out to Mr. Justice KAPELMAN:

> "Now, what the Appellate Division did, sir, on our appeal, this is what they said, 'Order Supreme Court, New York County, entered on August 22, 1972, insofar as it denied plaintiff's motion for an order of consolidation of

concurrent consideration and for summary judgment, unanimously reversed under law and said order insofar as it denied the cross motion of defendant Benedict Ginsberg, unanimously modified. that on the law and the facts and the cross motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and disbursements.'

So that the Appellate Division not only unanimously sustained our position without qualification or condition, and also sustained, as your Honor can readily recognize our position. As I told the Appellate Division I am not saying that Mr. Ginsberg hasn't earned his fee to the fullest extent that he claims but at least I am entitled to be heard as to that; and they remanded it with my right to be heard."(Min. Proc. KAPELMAN, J. Nov. 15'73,pp.7,8)

Accordingly, the following occurred when Mr. GINSBERG offered his written retainer in evidence:

"I would now like to offer the retainer itself in evidence.

MR. GOTTLIEB: There is no objection, your Honor, but I take the position as I did throughout all these proceedings, it is not binding upon my client.

THE COURT: Show it to the representative of,counsel for Chemical.

MR. TASHMAN: We have no objection.

THE COURT: Let it be received in evidence. (Court Reporter marked document Defendant's Exh. A in evidence, this date)

MR. GINSBERG: Together with that, I should also like to offer in evidence a letter dated August 12, 1971, that my clients signed when I conferred with them in Europe after the money had been received which restates the retainer, makes the computation and brings everything up to date. This letter was an

exhibit in the record to the Appellate Division as also was the letter of retainer, and this is the only other exhibit I believe I have and I would like to offer this now.

MR. GOTTLIEB: I have no objection, your Honor, but I make the same reservation.

MR. TASHMAN: Chemical Bank has no objection.

THE COURT: (Received in evidence, as Defendant-Ginsberg Exh. B, this date.)

THE COURT: Proceed."

(Min.Proc.KAPELMAN,J. Nov.15'73,pp38,39)

At the conclusion of the hearing and after a conference with the Court the following proceedings were had:

"Now, since we had the conference with your Honor and I think the record should also state that Mr. Ginsberg was very vehement and adamant about sticking to his forty per cent retainer and I was equally adamant about having a modification of it. And your Honor sat there and Mr. Ginsberg said, 'If your Honor awards him a fee less than the amount of his retainer' he said, 'he was going to take an appeal.' And after conference with Mr. Ginsberg and myself, I think I convinced him. We are both agreed as to the practicality of having the percentage fixed at thirty-five percent of the amount plus interest.

And also, Mr. Ginsberg, you haven't mentioned your disbursements.

THE COURT: Will you just set forth the disbursements quickly, Mr. Ginsberg?

MR. GINSBERG: $994.05."

(Min. Proc. KAPELMAN, J. Nov.15'73, 51,52)

The record further shows:

"THE COURT: Does the defendant Chemical Bank New York Trust Company desire to ask any questions on the basis of testimony here, counsel?

MR. TASHMAN: No, your Honor, we do not but I would like to make the record clear that by our unparticipation which does not accept or accede to the characterization by Mr. Ginsberg of the conduct of Chemical Bank, its employees or of its counsel.

THE COURT: Very well. Now, with reference to the fee, do I take it, Mr. Ginsberg, based upon the remarks of Mr. Gottlieb that you consent to the acceptance of a fee in the sum of 35 percent of the amount as it now stands together with interest?

MR. GOTTLIEB: Less seventeen-thousand dollars.

THE COURT: Less $17,500.00.

MR. GINSBERG: Well, I have made some computations.

THE COURT: Just one moment. Plus the $994.05 disbursements."

(Min. Proc. KAPELMAN, J. Nov.15'73 pp.53,54)

* * * *

"THE COURT: Now, just one moment. Do I take it that you agree to accept the sum of 35 per cent in lieu of your retainer, the 35 per cent less that which has been received by you on account as the retainer?

MR. GINSBERG: Yes.

THE COURT: And the 35 per cent as against the settlement sum of $215,000.00 and also 35 percent as against the interest which is accrued on the $17,500 sum of $215,000.00?

MR. GINSBERG: Yes

MR. GOTTLIEB: That is agreed to, your Honor.

THE COURT: And that is agreed to by Sociedad?

MR. GOTTLIEB: Yes.

THE COURT: And as far as the Chemical Bank, they are standing mute on this, is that correct?

MR. TASHMAN: That's correct.

> THE COURT: Very well, Now, will you please submit an order to that effect together with the figures as computed by Mr. Ginsberg and I shall reach it with the utmost of dispatch?"
> (Min. Proc. KAPELMAN, J. Nov.15'73, pp.55,56)

It is noteworthy at this point that at the conclusion of Mr. GINSBERG's testimony the following inquiries were directed by me to Mr. GINSBERG:

> "MR. GOTTLIEB: Mr. Ginsberg, I have one question. In your carefully detailed recital I noticed that you don't mention Adriana Bosurgi, the mother of Leone and Emilio, at all.
> MR. GINSBERG: I had no awareness of her existence until after the judgment was made and the U.S. brought an action or threatened an action in which they said that the securities which were in the names of my clients had been purchased with money that at some earlier point in time had been joint monies of Adriana and her sons and that was the first time that I heard of the existence of Adriana.
> MR. GOTTLIEB: And in the suit you brought which was pending and still pending undetermined before His Honor, the sole plaintiffs in that case were who?
> MR. GINSBERG: Leone Bosurgi and Emilio Bosurgi."
> (Min. Proc. KAPELMAN, J. Nov.15'73 pp. 49,50)

That all of the proceedings had, as above depicted, were truly of an adversary nature cannot be the subject of honest denial. In conclusion, it is only necessary to make

* Should read "settlement"

brief reference to the documentary evidence that was presented to Mr. Justice KAPELMAN which is, of course, contained in the aforesaid record on appeal and upon the basis of which the Appellate Division granted summary judgment. In 1954 SAICI, a Uruguayan company, entered into a joint venture with W. Sanderson & Sons of Milan, Italy, to finance, build and establish a citrus bi-products plant for Sanderson in Concordia, Argentina. For "commercial, competitive reasons," and to maintain secrecy which plaintiff*determined necessary to foster and promote its enterprise, SAICI agreed with Adriana Bosurgi and her sons Leone Bosurgi and Emilio Bosurgi, all Italian nationals, to channel repayment of SAICI's loans for the Concordia enterprise through the deposit of dollars in an account in the Bosurgi name at a designated New York bank. On December 10, 1954, plaintiff and Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi entered into a written trust agreement. A copy of said agreement in original Italian with English translation appended thereto was annexed to our moving papers before Mr. Justice KAPELMAN. The parties provided:

> "According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place

*Our references to plaintiff, of course, refer to SAICI as plaintiff in the state Court litigation, the defendant in this action.

> gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested.
>
> Yearly, or at period of time to be set by mutual consent, the parties hereto shall determine profits, amortization amounts and interests, and shall establish a balance to be kept freely at Mrs. Bosurgi's disposal, registered in her name or in the name of her sons, in fiduciary administration for S.A.I.C.I."

The Chemical Bank was designated as depository for plaintiff's funds pursuant to the aforesaid agreement and an account was established in the names of "Adriana Bosurgi and/or Leone Bosurgi and Emilio Bosurgi" for the deposit and custody of plaintiff's funds in accordance with and subject to the fiduciary relationship created by their agreement of December 10, 1954. This agreement and every other document presented to Mr. Justice KAPELMAN reflecting the creation, existence and continued operation of the foregoing fiduciary relationship between the Bosurgis and plaintiff SAICI concerning funds deposited to the Bosurgi account at the Chemical Bank have been acknowledged by defendants, pursuant to plaintiff's demand

therefor, to be "true copies of the originals" which were "duly executed by the persons whose signatures appeared thereon", that the "English translations thereof are true and accurate" and that the said documents are in all respects "genuine and authentic."

The trust relation and custodial capacity in which the Bosurgis held plaintiff's funds in the said Chemical Bank account was affirmed in writing at various times as the unchallenged documentary exhibits, in Italian with English translation, likewise presented to Mr. Justice KAPELMAN.

On January 26, 1955, Adriana Bosurgi and her sons Leone Bosurgi and Emilio Bosurgi wrote to plaintiff SAICI stating in part:

> "Mr. President:* * *We consider the agreement fully effective and valid in every respect according to the draft of December 10, inst., also before receipt of the final draft."

On January 10, 1959 Adriana Bosurgi, with confirmation by Leone Bosurgi and Emilio Bosurgi, wrote to plaintiff SAICI:

> "Gentlemen: We hereby advise you that the accounts with your shareholders were settled up to and

including December 31, 1958, and therefore the cash or securities amount, in conformity with the list submitted to the same and marked with their initials, have allowed for the closing of the balance relative to the Sanderson Argentina and W. Sanderson, Milano-Messina (Italia), administrations.

It is hereby confirmed that the undersigned remains the trustee and will administer in her own name, but on your behalf, the assets existing in New York relative to the final balance, as it was agreed upon.

This to reassure and inform you. Awaiting your kind confirmation, we remain

Very truly yours,"

Again, on January 25, 1961, Adriana Bosurgi and Leone Bosurgi and Emilio Bosurgi wrote to plaintiff SAICI stating:

"Gentlemen: We advise you hereby that accounts were settled up to and including December 31, 1960, and after settling the debit and credit balance, we determined the amount which remains at your disposal according to the reckonings we agreed upon, and which should be retained reservedly by both parties.

It is understood, in confirmation of the previous agreements, that the balance of your accounts shall be administered by the writer as the trustee, and eventually by the undersigned in her absence, and that the securities fiduciary deposit existing with the Chemical Bank of New York, remains under the name of Adriana Bosurgi, who shall be answerable to your company for the same, according to previous agreements thereof."

Further confirmation was had by letters dated July 12, 1962, August 1, 1962 and December 20 1962.

After the aforesaid hearing before Mr. Justice KAPELMAN concerning Mr. GINSBERG's compensation, final judgment was entered on December 12, 1973, a true copy of which is hereto annexed as Ex. B and which:

> "ORDERED, ADJUDGED AND DECREED, that the funds which were and are the subject of Action No. 2, above entitled, and the securities representing same, as well as the accumulated interest thereon that were and are the result of the settlement of said lawsuit, heretofore approved by this Court, belong to and are the property of plaintiff, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, which the parties litigant, above named, LEONE BOSURGI and EMILIO BOSURGI, are simply holding in a fiduciary and custodial capacity for said plaintiff, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, perforce of a Trust established in writing December 10, 1954, between plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and said LEONE BOSURGI and EMILIO BOSURGI and their mother, ADRIANA BOSURGI; and it is further
>
> ORDERED, ADJUDGED and DECREED, that the aforesaid fund resulting from said settlement in the sum of $215,000.00 and the securities representing the same, plus accrued interest thereon, now being held in escrow by said BENEDICT GINSBERG, Esq., hereby adjudged and decreed to belong to and title to which vests in plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, is subject to a retaining lien of said BENEDICT GINSBERG, Esq.,

for the legal value of his services and reasonable disbursements incurred in connection with the aforesaid lawsuit and th. settlement thereof as fixed pursuant to stipulation placed upon the record at the aforesaid hearing by and between counsel for SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and BENEDICT GINSBERG, Esq. as follows: Said BENEDICT GINSBERG, Esq., shall be entitled to 35% of the settlement sum of $215,000.00 less his retainer of $17,500.00 and less his actual disbursements in the sum of $2,984.65, namely, $68,080.37 plus 35% of all accrued interest to the date of payment and in addition thereto shall be entitled to receive that part of his said actual disbursements remaining unreimbursed in the sum of $994.05."

As previously noted, as far back as October, 1971, copies of our aforesaid application for summary judgment and the supporting documents relied on were sent to MICHAEL I. SALTZMAN, Esq., Assistant United States Attorney,as well as to counsel for the Bank (pp.7,13, supra). Subsequently, after the adverse decision before Mr. Justice KAPELMAN, two (2) copies of our motion for summary judgment were delivered to LEON HART, Esq., and to his associate, Miss WESTON (pp. 16,17, supra) counsel in charge at the Appellate Division of I.R.S., who were advised that "we would defer perfecting the appeal pending your review and reaction to the copies of papers you requested and which we rushed to your office that very day" and since nothing was heard from them "we are left with no other recourse but to proceed with the appeal."

It bears emphasis to state that throughout all of these intervening years and up to the present time, not a shred of evidence has been presented which, in the slightest degree, challenges the genuineness and authenticity of the documents upon which summary judgment was granted.

It is respectfully submitted that government counsel had and have no basis whatsoever for taking the position before this learned Court, as was done before Mr. Justice KAPELMAN to make allegations against SAICI or the BOSURGIs "without evidentiary proof" or to ask leave to go on the judicially characterized "fishing excursion" in order to discover whether any such proof can be found. More than ample time has elapsed for the pursuit of any such activity assuming that it can conceivably be justified upon this record.

It will be demonstrated in the memorandum herewith submitted that upon the unchallenged and unchallengeable facts summary judgment should be granted as matter of law.

SAMUEL GOTTLIEB

SWORN TO BEFORE ME THIS
[illegible] DAY OF JANUARY, 1974

NOTARY PUBLIC

[illegible]
Notary Public, State of New York
[illegible]

EXHIBIT "A" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE -A- ~~355~~ 346

At a Special Term, Part I, of the Supreme Court of the State of New York held in and for the County of New York at the County Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York on the 12 day of ~~November~~ December, 1973.

P R E S E N T:

HON. WILLIAM KAPELMAN,

JUSTICE.

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

- against -

LEONE BOSURGI and EMILIO BOSURGI,

Defendants,

and

BENEDICT GINSBERG,

Defendant

INDEX NO. 22140/71

Action No. 1

LEONE BOSURGI and EMILIO BOSURGI,

Plaintiffs,

- against -

CHEMICAL BANK NEW YORK TRUST COMPANY,

Defendant.

INDEX NO. 7939/66

Action No. 2

Upon the decision and order of the Appellate Division, First Department, made and entered herein November 8, 1973, and upon the Remittitur of said Appellate Division upon which the aforesaid decision and order were made and entered and a hearing having been held this 15th day of November, 1973, pursuant to the aforesaid order of the Appellate Division "to determine the fixation of fees" of BENEDICT GINSBERG,Esq., pursuant to notice of BENEDICT GINSBERG, Pro Se, directed to and served upon GAINSBURG, GOTTLIEB, LEVITAN & COLE, Esqs., attorneys for plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, CRAVATH, SWAINE & MOORE, Esqs., attorneys for CHEMICAL BANK NEW YORK TRUST COMPANY, and the UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, and evidence having been duly adduced on the issue concerning said legal fees and after having heard GAINSBURG, GOTTLIEB, LEVITAN & COLE, Esqs. (Samuel Gottlieb and Alan C. Krieger, of counsel) attorneys for plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, BENEDICT GINSBERG, Esq., Pro Se, and as attorney for the litigants above named, LEONE ROSURGI and EMILIO ROSURGI, and CRAVATH, SWAINE & MOORE, Esqs. (Andrew Tashman, of counsel) attorneys for CHEMICAL BANK NEW YORK TRUST COMPANY and the UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK or any representative thereof not having appeared and due deliberation having been had and a stipulation having been entered on the record

by and between counsel for plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and BENEDICT GINSBERG, Esq., fixing his said legal fees as hereinafter provided,

N O W, on motion of GAINSBURG, GOTTLIEB, LEVITAN & COLE, attorneys for plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES in Action No. 1, above entitled, it is

O R D E R E D, that the above entitled actions be and the same hereby are consolidated and shall bear the Index Number 7939/66; and it is further

O R D E R E D, that the motion of said plaintiff, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES for summary judgment be and the same is hereby granted as hereinafter provided; and it is further

O R D E R E D, that the cross-motion of defendant, BENEDICT GINSBERG, above named, for summary judgment be granted to the extent of setting up a hearing, held and concluded, as above noted, on November 15, 1973, for the determination of the legal fees due and payable to said defendant as hereinafter specified; and it is further,

O R D E R E D, A D J U D G E D and D E C R E E D, that the funds which were and are the subject of Action No. 2, above entitled, and the securities representing same, as well as the accumulated

interest thereon that were and are the result of the settlement of said lawsuit, heretofore approved by this Court, belong to and are the property of plaintiff, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, which the parties litigant, above named LEONE BOSURGI and EMILIO BOSURGI, are simply holding in a fiduciary and custodial capacity for said plaintiff, SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, perforce of a Trust established in writing December 10, 1954, between plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and said LEONE BOSURGI and EMILIO BOSURGI and their mother, ADRIANA BOSURGI; and it is further

O R D E R E D, A D J U D G E D and D E C R E E D, that the aforesaid fund resulting from said settlement in the sum of $215,000.00 and the securities representing the same, plus accrued interest thereon, now being held in escrow by said BENEDICT GINSBERG, ESQ., hereby adjudged and decreed to belong to and title to which vests in plaintiff SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES, is subject to a retaining lien of said BENEDICT GINSBERG, ESQ., for the legal value of his services and reasonable disbursements incurred in connection with the aforesaid lawsuit and the settlement

thereof as fixed pursuant to stipulation placed upon the record at the aforesaid hearing by and between counsel for SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and BENEDICT GINSBERG, Esq., as follows: Said BENEDICT GINSBERG, Esq., shall be entitled to 35% of the settlement sum of $215,000.00 less his retainer of $17,500.00 and less his actual disbursements in the sum of $2,984.65, namely, $68,080.37 plus 35% of all accrued interest to the date of payment and in addition thereto shall be entitled to receive that part of his said actual disbursements remaining unreimbursed in the sum of $994.05.

E N T E R,

S/ William Kaplowitz

J.S.C.

Filed
Dec 14, 1973
New York
Co. Clerk's Off

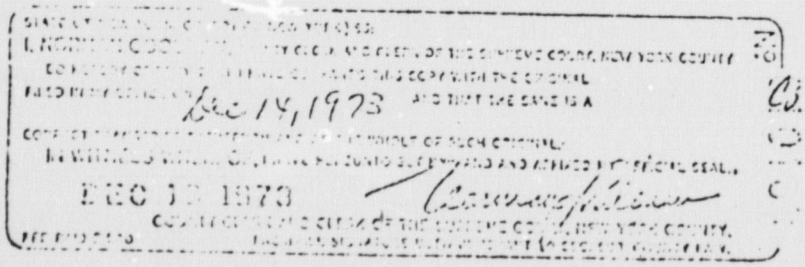


EXHIBIT "C" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-195

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

----------x

71 CIV. 928 (KTD)

APPLICATION ON BEHALF OF DEFENDANT BENEDICT GINSBERG FOR SUMMARY JUDGMENT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of BENEDICT GINSBERG, sworn to the 28th day of January, 1974, and upon the exhibits annexed and therein referred to, and upon the Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated November 8, 1973 and a copy of the Record on Appeal upon which said Order was made and entered, and upon all the proceedings heretofore had herein, and in conformity with the proceedings had before this learned Court on December 20, 1973 the undersigned, defendant BENEDICT GINSBERG, appearing pro se, moves and submits this application (a) for summary judgment dismissing the complaint herein as against him pursuant to Rule 56 of the Federal Rules of Civil Procedure and (b) for an order authorizing and permitting the said BENEDICT GINSBERG to distribute

the sum of $215,000, together with the interest accrued and accruing thereon, which said sum is now held in escrow by him pursuant to the order of Judge DUDLEY B. BONSAL made March 18, 1971 (i) by deducting therefrom his retaining lien as fixed by the order of Mr. Justice WILLIAM KAPELMAN made December 12, 1973 and (ii) by paying the then remaining balance to SAMUEL GOTTLIEB, as attorney for Sociedad Anonima De Inversiones Commerciales E Industriales, and upon proof by affidavit of BENEDICT GINSBERG that such payment has been made, discharging the said BENEDICT GINSBERG from all further obligations under said order of Judge DUDLEY B. BONSAL, and for such other and further relief as to the Court may be deemed proper in the premises.

Dated: New York, N. Y.
January 28, 1974

Yours, etc.

BENEDICT GINSBERG

TO:

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, New York 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, New York 10005

GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
Attorneys for Defendant
Sociedad Anonima De
Inversiones Commerciales E
Industriales
122 East 42nd Street
New York, New York 10017

(46)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI and EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and BENEDICT GINSBERG,

Defendants,

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, and W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader,

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONES COMMERCIALES E INDUSTRIALES, and W. SANDERSON & SONS,

Third-Party Defendants.

MOVING AFFIDAVIT
of
BENEDICT GINSBERG

71 Civ. 928

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am one of the defendants herein, appearing pro se, and submit this affidavit in support of my motion (a) for summary judgment in conformity with the proceedings had before this learned Court on December 20, 1973, and (b) for an order authorizing and permitting me to distribute the sum of $215,000, together with the interest accrued and accruing thereon, which said sum is now held in escrow by me pursuant to the order of Judge Dudley B. Bonsal made March 18, 1971 (i) by deducting therefrom my retaining lien as fixed by the order of Mr. Justice William Kapelman made December 12, 1973 and (ii) by paying the then remaining balance to Samuel Gottlieb, as attorney for Sociedad Anonima De Inversiones Commerciales E Industriales, (referred to herein as SAICI) and upon proof by my affidavit that such payment has been made, discharging me from all further obligations under said order of Judge Dudley B. Bonsal, and for such other and further relief as to the Court may be deemed proper in the premises.

It is conceded by all parties that I hold the sum of $215,000 (together with the accruals thereon) as the proceeds of the settlement of an action commenced in 1966, entitled

Leone Bosurgi and Emilio Bosurgi v. Chemical Bank New York Trust Company (Sup. Ct. N.Y. Co; Index No. 7939/1966) in which action I represented the Bosurgis as their attorney, and in which action, the defendant, as the trial was about to commence, agreed to pay the Bosurgis the sum of $215,000, to be deposited with me, in escrow, pursuant to a stipulation, a copy of which is Exhibit "A" hereof, which was dictated on the record by counsel and the Court.

In December of 1966 I was retained by the Bosurgi Brothers, Leone and Emilio, to institute that suit against Chemical Bank New York Trust Company (The Bank) to recover damages because of The Bank's conversion to its own use of 5,200 shares of stock owned by the Bosurgis and held by The Bank as custodians, and because of The Bank's fraud in inducing the Bosurgis to execute certain documents which it thought would serve to ratify their misconduct.

The plaintiffs alleged in said action, among other things, that The Bank improperly and unauthorizedly used their stock as collateral for a loan to third parties, whom The Bank knew to be of questionable integrity and against whom there were unsatisfied judgments of record, and that the transaction resulted in a complete loss to my clients.

The enormity of The Bank's misconduct is evident from the fact that its vice-president, who handled the trans-

action, admitted on his deposition, that the use of my clients securities as collateral, for the loan which The Bank made to said third parties was made without any authorization from my clients. The said bank vice-president testified that he used my clients' securities as collateral, on the oral statement of the borrower that my clients had approved it. The bank vice-president admitted that he had not verified the borrowers statements, in any manner whatever. After many complex and involved proceedings, motions and appeals, and after extensive depositions in New York City and in Rome, Italy, the case came on for trial before Mr. Justice Kapelman in Supreme Court, New York County.

At an all-day conference held before Mr. Justice Kapelman a settlement was arrived at and a stipulation dictated into the record, on September 15, 1970, which provided among other things that the action was settled for the sum of $215,000 to be paid within ten days from the date of the stipulation, upon terms and conditions therein set forth.

The Bank refused to comply with the provisions of the stipulation and I was required to make an application to the Court in which the action had been instituted, for an order directing The Bank to pay the $215,000 to me, which I of course would hold in escrow pursuant to the terms of the stipulation.

Before my said application was determined, the plaintiff herein, UNITED STATES OF AMERICA, brought a proceeding in this Court, to direct the payment of the proceeds of the said settlement in a manner different from that provided in the stipulation of settlement. The application came on before Judge Dudley B. Bonsal who denied the motion and ordered The Bank to pay me, as escrowee, the said $215,000, with which sum I was to purchase a Certificate of Deposit of The Chase Manhattan Bank, which Certificate I was to hold subject to such further order "which may be made with regard to the rights of the United States of America, or any other claimant to the said $215,000." A copy of Judge Bonsal's order is Exhibit "B" hereof.

The Bank took an appeal from Judge Bonsal's order. The United States Court of Appeals for this Circuit unanimously affirmed.

After the foregoing affirmance The Bank finally turned over to me the sum of $215,000. I invested it in a Chase Bank Certificate of Deposit as required by Judge Bonsal's order. My clients thereafter, and by letter dated August 12, 1971, reconfirmed the terms of my retainer and agreed upon the amount then due me for services. The letter is Exhibit "C" hereof. The Court will note that my agreed contingent fee of 40% is computed on an amount, which, as of August 12, 1971 includes interest accruing on the Certificate of Deposit.

After the proceeds of the settlement had been turned over to me SAICI instituted an action in the Supreme Court, New York County, claiming title to the monies I had recovered for my clients, the Bosurgis, and was holding in escrow, on the ground that at all times, and even prior to the acquisition of the 5,200 shares of stock by my clients, which The Bank had converted, the monies were trust funds belonging to SAICI, SAICI also made a motion to consolidate its action with the action that I had instituted, to wit, Bosurgi v. Chemical Bank, and also moved for summary judgment.

I made a cross-motion for an order fixing my fee, to be paid out of the escrow monies, in the sum of $78,800.19 plus 40% of the interest accruing on the sum of $215,000, as expressly fixed in my clients' letter of August 12, 1971, Exhibit "C" hereof.

Copies of the papers on the motion and the cross-motion were duly served upon the attorneys for all the parties upon whom the subject motion is served.

Thereafter, and following the denial of my motion in the State Court for summary judgment on my application for the payment of my fee out of the monies I hold in escrow (subject of course to the provisions of Judge Bonsal's order) I appealed to the Appellate Division of the Supreme Court of the State of

New York. That Court modified the order and directed that my motion for summary judgment be granted to the extent of a remand for a hearing to determine the amount of my fee. A copy of that order is Exhibit "D" hereof.

The only question then remaining for consideration was the amount of my fee, and that question has now been resolved.

The Appellate Division, by order dated November 8, 1973, Exhibit "D" hereof, unanimously modified the denial of my motion for summary judgment "to the extent of a remand for a hearing to determine the fixation of fees..."

The order of the Appellate Division also states:

> "...we find no impediment to this court's determining an issue of fact competently before it regardless of peripheral federal questions. Venitron Corp. v. Benjamin, 440 F.2d 105 (2nd Cir.) Cert. Den. 402 U.S. 987, 91 S.Ct. 1664, 29 L. Ed. 2d 154. And it is clearly so when the plaintiff herein has not been stayed by a Federal Court order".

Pursuant to the foregoing order I duly served notice of the hearing directed by said order upon all counsel, including the United States Attorney for the Southern District of New York.

The hearing was held before Mr. Justice Kapelman on November 15, 1973. In the course thereof I testified and placed upon the record a description of the legal services rendered by me and stated that in my opinion those services were of a value in excess of the amount provided for in my written retainer.

I offered my written retainer in evidence and counsel for The Bank expressly stated "Mr. Tashman: We have no objection".

I also offered in evidence the letter dated August 12, 1971, to which I have referred above, that my clients signed when I conferred with them in Europe after I had received the $215,000 in escrow, which letter restated the terms of my retainer at 40% and computed the amount then due thereon as my fee.

I offered that letter in evidence and again Mr. Tashman said "Chemical Bank has no objection" (p. 38-9).

At the close of the hearing counsel for SAICI said:

> "Now, since we had the conference with your Honor and I think the record should also state that Mr. Ginsberg was very vehement and adamant about sticking to his forty per cent retainer and I was equally adamant about having a modification of it. And your Honor sat there and Mr. Ginsberg said, 'If

> your Honor awards him a fee less than the amount of his retainer' he said, 'he was going to take an appeal.' And after conference with Mr. Ginsberg and myself, I think I convinced him. We are both agreed as to the practicality of having the percentage fixed at thirty-five percent of the amount plus interest.
>
> And also, Mr. Ginsberg, you haven't mentioned your disbursements.
>
> THE COURT: Will you just set forth the disbursements quickly, Mr. Ginsberg?
>
> MR. GINSBERG: $994.05."
>
> (Min. Proc. KAPELMAN, J. Nov.15'73, 51,52)

Following the hearing before Mr. Justice Kapelman concerning my compensation, final judgment was entered on December 12, 1973, a true copy of that judgment is Exhibit "E" hereof. It provides among other things:

> "ORDER, ADJUDGED AND DECREED that the aforesaid fund resulting from said settlement in the sum of $215,000.00 and the securities representing the same, plus accrued interest thereon, now being held in escrow by said BENEDICT GINSBERG, Esq., ...is subject to a retaining lien of said BENEDICT GINSBERG, Esq., for the legal value of his services and reasonable disbursements incurred in connection with the aforesaid lawsuit and... Said BENEDICT GINSBERG, Esq., shall be entitled to 35% of the settlement sum of $215,000.00 less his retainer of $17,500.00 and less his actual disbursements in the sum of $2,984.65, namely, $68,080.37 plus 35% of all accrued interest to the date of payment and in addition thereto shall be entitled to receive that part of his said actual disbursements remaining unreimbursed in the sum of $994.05."

The plaintiff made no application to stay the State Court action during the period of approximately three years that proceedings were in progress there.

The Appellate Division noted in its decision that "the plaintiff herein has not been stayed by a Federal Court".

On my prior motion addressed to the plaintiff's desire to take my deposition in this action Judge Duffy said "The United States of America has effectively refused to do anything about the State Court action" (order 11/14/73).

The only persons or parties who have or ever had an interest in my fee, or the manner in which it is computed, have either agreed to the amount fixed by Judge Kapelman, or participated in the proceeding at which the fee was fixed. Accordingly I see no basis upon which any person or party can now be heard to object. My clients' letter of August 12, 1971 confirmed their approval of a sum even greater than that allowed by Judge Kapelman. Chemical Bank opposed my original application and argued against it in the Appellate Division. At the subsequent hearing its counsel tried to walk on both sides of the street. He asked the Court to indicate for the record that he was taking no position, but he nevertheless submitted a counter-proposed order which would, if signed, have eliminated any reference to the fact that the amount fixed as the value of

my services was a lien on the monies in my possession. Despite the efforts of counsel for Chemical Bank to prevent the entry of an order containing the provision to which I now refer, the order expressly provides that the monies I hold in my possession are "subject to a retaining lien of said Benedict Ginsberg, Esq. for the legal value of his services and reasonable disbursements incurred in connection with..." and the order then proceeds to fix the amount of my fee and disbursements at the amount indicated above.

The position of the U.S. attorney is also ambivalent. After his unsuccessful attempt in March of 1971, almost three years ago, to direct me to turn over the money I held in escrow, to the plaintiff, he did nothing until the first hearing before Judge Kapelman in which his position, and my response, are described in the Judge's opinion, in the following language:

> "The government maintains that the most expeditious manner of disposing of the issues is to litigate the title to the fund in the Federal Court. Ginsberg maintains that the State Supreme Court, where the earlier action was litigated, is the only court that has the power to fix his attorney fees."

Except for suggestion that this Court might be a more expeditious place to have the fee issue disposed of, the U.S. attorney did nothing further in that regard, until the argu-

ment of the appeal by me, and by SAICI, from Mr. Justice Kapelman's order denying our applications for summary judgment. and then the U.S. attorney did nothing significant.

Prior to the argument of that appeal, and by letter dated September 14, 1973, addressed to the Justices of the Appellate Division, First Department, the U.S. attorney in charge of the matter requested the Court to affirm the orders, indicating that he was "writing as amicus to the Court". The fact is that his letter was returned to him by the Clerk of the Appellate Division with instructions to make an application for leave to appear amicus, if it was his desire to address the Court in that capacity.

If the U.S. attorney had some reason for not seeking to transfer the Bosurgi State Court action to this Court, during the three year period that he has been aware that it has been pending, the reason continues to be unexpressed.

It is thus clear that everyone now before the Court has had a full and fair opportunity to advance whatever arguments might be suggested by anyone in opposition to what I now seek and no valid argument has ever been so advanced.

I have a lien on the fund in my possession, for the services I rendered in creating the fund. The escrow money came into existence solely by reason of my efforts in the

action by the Bosurgis against The Bank. No one, neither plaintiff's attorneys, SAICI's attorneys, nor the attorneys for Chemical Bank can dispute this.

The plaintiff has described this action in the brief submitted on December 20, 1973, as follows:

> "This action by the United States of America was commenced on March 3, 1971 to obtain a judgment for the unpaid federal estate taxes of Adrian Bosurgi against Leone Bosurgi, Emilio Bosurgi and Chemical Bank. The action also sought to foreclose on the property of the Bosurgis in satisfaction of the estate tax liens." (pp. 1,2)

I direct attention to the following (a) the lien which the plaintiff seeks to impress is sought to be impressed solely on and against a fund in my possession as the result of an action instituted approximately five years before the present action was commenced, (b) my lien for services accrued upon the commencement of that action in 1966, (c) my lien matured, fully, when that action was settled on September 15, 1970, long before this action was commenced, (d) I have a statutory lien, a common law charging lien and a common law retaining lien, (e) my lien was fixed in proceedings in the Supreme Court of the State of New York, in the Appellate Division of that Court and ultimately, on remand from that Court, in the Supreme Court. The attorney for the plaintiff was fully informed of every step taken. He participated in some of the proceedings and attempted

to participate in other portions, but declined to pursue the course suggested by the Court. He should not now be heard to urge a position which for more than three years he declined to take.

In view of the foregoing I respectfully request that an order be made herein for summary judgment dismissing the complaint as against me and that a further order be made authorizing and permitting me to distribute the funds I hold pursuant to Judge Bonsal's order.

BENEDICT GINSBERG

Sworn to before me this
28th day of January, 1974.

ROSE MAMLOUK
Notary Public, State of New York
No. 31-7683429
Qualified in New York County
Commission Expires March 30, 1974

EXHIBIT "A" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-448

- - - -

Exhibit B - Letter dated August 12, 1971
Annexed To Foregoing Affidavit

August 12, 1971

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Bosurgi v. Chemical Bank

Dear Sir:

This will confirm our understanding with respect to fees in the above matter.

Pursuant to the terms of our retainer, dated December 1966, you were to receive and you have received the sum of $17,500. You were also to receive a contingent fee of 40% of the amount of the recovery in excess of said sum of $17,500 and of the disbursements thereafter incurred, which, if advanced by you, would be reimbursed by us. Total disbursements were incurred in the amount of $2,984.65. Accordingly, your 40% is to be computed on the total recovery in excess of $17,500 plus $2,984.65, to wit, $20,484.65. You were holding in escrow a certificate of deposit issued April 29, 1971 by Chase Manhattan Bank in the amount of $215,000. 40% of the net of $215,000 minus $2,984.65 is $77,806.14. You are to receive that sum plus $994.05, which you spent in disbursements not previously reimbursed to you. You are also to receive 40% of the sums which have accrued or will hereafter accrue on the $215,000 and on the increment thereof.

Yours truly,

Leone Bosurgi

P.S. I acknowledge receipt of a photocopy of the renewed Certificate of Deposit dated July 28, 1971 in the amount of $217,485.94, which amount represents the sum originally deposited together with accrued interest thereon to July 28, 1971. I understand that you will "roll over" this amount, from time to time, until you are permitted by an appropriate order of the court to disperse the funds.

Leone Bosurgi

EXHIBIT "D" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-195

- -

EXHIBIT "E" ANNEXED TO THE FOREGOING AFFIDAVIT IS REPRODUCED IN THIS APPENDIX AT PAGE A-258

(47)

A 284

DPL:eb
71-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSUNGI, et al.,

Defendants.

NOTICE OF MOTION

71 Civ. 928 (KTD)

----------x

S I R S :

PLEASE TAKE NOTICE that the plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, upon the annexed affidavit [illegible], will move before the Honorable Kevin Thomas Duffy, by submission, or as the Court shall otherwise direct, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure to dismiss the claim of Sociedad Anonima de Inversiones Comerciales e Industriales.

Dated: New York, New York
February [illegible], 1974

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America

By: /s/
DAVID P. LAND
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: 212 264-6321

DFL:eb
71-0572

A 285

TO:

GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
122 East 42nd Street
New York, New York 10017
Attorneys for Defendant Sociedad Anonima
de Inversiones Comerciales
e Industriales

[illegible] ESQ.
475 Fifth Avenue
New York, New York 10017

CRAVATH, [illegible], ESQS.
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
Chemical Bank New York Trust Co.

(48)

A 286

DPL:eb
71-0572

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - x

STATEMENT PURSUANT TO RULE 9(g)

71 Civ. 928 (KTD)

Plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, in support of its motion for summary judgment dismissing the claim of the defendant Sociedad Anonima de Inversiones Commerciales e Industriales and for its Statement Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, contends that there is no genuine issue to be tried in respect of the following material facts:

1. Adriana Bosurgi was an Italian citizen and nonresident alien of the United States who died on March 27, 1963. She was survived by two sons, Leone Bosurgi and Emilio Bosurgi who are Italian citizens and nonresident aliens of the United States.

2. On May 13, 1954 Adriana Bosurgi opened a securities account at Chemical Bank in New York City and on that date she deposited $400,000 into that securities account as evidenced by the Custodian Account Agreement

(Exhibit A) and Chemical Bank's Memorandum for Credit Department (Exhibit B).

3. With respect to the securities account opened by Adriana Bosurgi, for the year ended December 31, 1962 and for the period January 1, 1963 to and including April 10, 1963, Chemical Bank filed Information Statements with the Internal Revenue Service reporting the taxable income earned by Adriana Bosurgi for such year and period. Exhibits C and D).

4. On April 10, 1963 Leone and Emilio Bosurgi opened a securities account with Chemical Bank as evidenced by the Custodian Account Agreement dated April 10, 1963 (Exhibit E), and on April 9, 1963 the sum of $673,107.97 was transferred from Adriana Bosurgi's securities account to the new securities account to be opened by Leone and Emilio Bosurgi as evidenced by Chemical Bank's records of transfer (Exhibit F).

5. Sociedad Anonima de Inversiones Commerciales e Industriales ("SAICI") is a corporation organized pursuant to the laws of Uruguay.

6. Pursuant to the laws of Uruguay, SAICI published accurate and complete financial statements for the years ending December 31, 1955 through December 31, 1963 of which accurate English translations are annexed as Exhibit G.

7. The aggregate value of foreign shares and securities owned by SAICI for the period January 1, 1955 through December 31, 1963 was $32,112.01.

8. On December 16, 1954, SAICI subscribed to and acquired for $32,112.01, 20,000 shares of stock of W. Sanderson & Sons, an Italian corporation.

9. Annexed hereto as Exhibit H are accurate English translations of the stock record books of W. Sanderson & Sons showing that for the period December 16, 1954 through March 27, 1963, SAICI owned 20,000 shares of stock of W. Sanderson & Sons.

10. On March 2, 1971 this Court entered a restraining order (Exhibit I), on March 18, 1971 this Court entered a further order (Exhibit J), on November 29, 1971 this Court entered an order (Exhibit K) authorizing service and filing of an amended complaint, and on June 2, 1972, this Court entered a default judgment (Exhibit L).

11. Annexed as Exhibit M is a copy of SAICI's answer to the United States' amended complaint.

12. On October 28, 1971, the United States Attorney wrote a letter (Exhibit N) to SAICI's counsel.

13. In June 1971, an Assistant United States Attorney attended an informal conference before Mr. Justice Kapelman of the New York County Supreme Court for the purpose of informing Mr. Justice Kapelman of the pending federal court action, and letters dated November 12, 1971 (Exhibit O) and January 9, 1972 (Exhibit P) were mailed to Mr.Justice Kapelman.

DrL:ed
71-0572

A 289

Dated: New York, New York
February 7, 1974

Respectfully yours,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America

DAVID P. LAND

Assistant United States Attorney

- Of Counsel -

A 290

CHEMICAL BANK & TRUST COMPANY
NEW YORK

Custodian Account

OF

MRS. ADRIANA BOSURGI

A 291

CHEMICAL BANK & TRUST COMPANY,

377 MADISON AVE., N.Y.17, N.Y.

New York, N. Y.

Dear Sirs:

You are requested to open a custodian account in the name of the undersigned on your books, and receive, hold and dispose of all securities now on deposit with you, or which may hereafter be deposited with you, for such account, for, and subject at all times to the instructions of the undersigned. The following conditions shall govern the operation of the account, until you receive notice in writing to the contrary:

1. All Communications from you are to be addressed to:

Name MRS. ADRIANA BOSURGI

Address c/ [illegible]

2. Proceeds from any sale, maturity or redemption of securities, and all other cash principal, and all interest, dividends and other income received by you relative to such securities, shall be disposed of as follows:

PRINCIPAL:

☒ Credit to Joint Checking Account of the undersigned with you.

☐ Credit to Custodian Cash account of the undersigned and hold.

☐ Remit to _____

INCOME:

☒ Credit to Joint Checking Account of the undersigned with you.

☐ Credit to Custodian Cash account of the undersigned and hold.

☐ Remit to _____

(Unless otherwise instructed, a single custodian cash account shall be maintained for both principal and income.)

When instructed to purchase securities or to receive them against payment, the cost thereof is to be charged first to the same account or accounts, if any, that the proceeds of sales are to be credited to, pursuant to the foregoing provisions of this paragraph 2, and if funds in such accounts are insufficient or the undersigned has no such account, then to any account the undersigned may have with you, but you shall not be obligated to purchase securities or make any payments unless sufficient funds therefor are so available.

3. Upon maturity or upon receipt by you of notice of call for redemption of bonds held in this account, the same are to be presented for payment in due course, except that, if the principal amount or redemption price with interest to date of maturity or redemption is available prior to such date, you are to proceed as below indicated:

☒ Present the same — unless rights of conversion, exchange or subscription appertain thereto — for prior payment without notice to the undersigned.

☐ Do not present the same for payment prior to the date of maturity or redemption, unless otherwise instructed by the undersigned.

4. You are authorized: (a) to exchange securities in temporary form for securities in definitive form, and (b) if the par value of any shares of stock held hereunder is changed, to effect the exchange of the certificates representing such shares.

5. Ownership Certificates: The undersigned hereby authorizes and directs you, until and unless advised to the contrary, to execute, as agent, in the name of the undersigned, as owner, any and all income tax ownership certificates, or other instruments which, pursuant to the provisions of the income tax regulations of the United States Treasury Department now or hereafter in effect, may be necessary or proper for the collection of coupons, interest or other payments on the securities now or hereafter held by you for such account, but without claiming any personal exemption or other credits. To enable you to execute such certificates or other instruments, the undersigned hereby certifies that the present status of the undersigned is as follows, and the undersigned agrees to notify you promptly in the event that any change occurs:

MRS. ADRIANA BOSURGI (NAME) — ITALY (CITIZEN OR SUBJECT OF) — _____ (LEGAL DOMICILE)

6. Securities in this account shall be sold, exchanged, transferred, delivered against receipt or payment, or otherwise disposed of, and payments shall be made against receipt of securities, and securities shall be purchased, and money in the custodian cash account shall be disposed of, all from time to time on the order of the person or any of the persons designated below, to whom, also, on request, securities, in negotiable form or otherwise as requested, shall be delivered from this account and payments made from the custodian cash account:

☒ The undersigned.

☒ Leo Bosurgi and Emilio Bosurgi each one signing as attorney

☐ If the undersigned is a corporation, the officers designated in the annexed resolutions adopted _____.

7. Registration of all securities in this account which are required to be registered, shall be as follows:

☐ In the name of the undersigned, _____ (ADDRESS)

☒ In the name of your nominee.

Notwithstanding the foregoing or other directions, whenever you deem it advisable for your protection, any securities whether registered in the name of your nominee or otherwise, may be registered in or transferred to the name of the undersigned, under advice. In transferring securities to or from the name of your nominee, you are authorized to certify that the undersigned is the owner of the securities and to claim exemption from transfer taxes accordingly, unless otherwise notified in writing by the undersigned. The undersigned will indemnify you and your nominee against any loss or liability incurred in connection with any securities held in this account, registered in the name of your nominee, by reason of assessments, calls, taxes or other costs, expenses or liabilities resulting from such registration.

8. Annual Statements: For preparing annual statements of income, classified for income tax purposes, including the cost, date of acquisition, and proceeds of sales or redemptions on security transactions, you are authorized to make a charge on the amount of actual work involved, the minimum charge to be $10.

☐ This service is desired.

☒ This service is not desired.

9. Fees: The undersigned agrees to pay the expenses incurred by you and [illegible] to you the amount of all taxes and other charges which may be required to be [illegible] connection with this account, and in addition, agrees to pay your fee at the following [illegible]

3rd Jan close.
No Activity charge

You are instructed to charge Joint Checking Account ~~Quarterly~~ Semi-annually ~~Annually~~ for the foregoing.

10. Special Instructions.

11. It is understood and agreed that you shall be under no duty to take any other action than hereinabove specified with respect to any securities, cash or other property deposited by or for the undersigned or information received relative thereto unless specifically agreed to by you in writing, or to appear in or defend any suit with respect thereto, unless requested by the undersigned in writing and indemnified to your satisfaction, and that you may at any time terminate this arrangement by notice in writing sent to the undersigned by registered mail at the address at the time on your records, whereupon you shall be under no obligation except to deliver to the undersigned any securities in this account and any funds in the custodian cash account.

Dated 5/13/54

Very truly yours,

J. Bosmajian

Accepted: 5/13/54

CHEMICAL BANK & TRUST COMPANY

By K. C. Inglam
ASST. SECRETARY

C. B. 91 (8-46)

A 294

MRS. ADRIANA BOSURGI

AUTHORIZED TO THE CHEMICAL BANK & TRUST COMPANY, ...

By the delivery of this card signed by the undersigned and the receipt thereof by the Ch... COMPANY, NEW YORK, it is mutually agreed between the undersigned and the Trust Company that ... Collections of the New York Negotiable Instruments Law shall be deemed to apply with respect to ... Trust Company in connection with all items, whether or not negotiable, received by the Trust Company f... undersigned and all items so received shall, in the absence of express agreement to the contrary, be ... received for collection only.

SIGNED A. Bosurgi

DATED MAY 13 1954 19

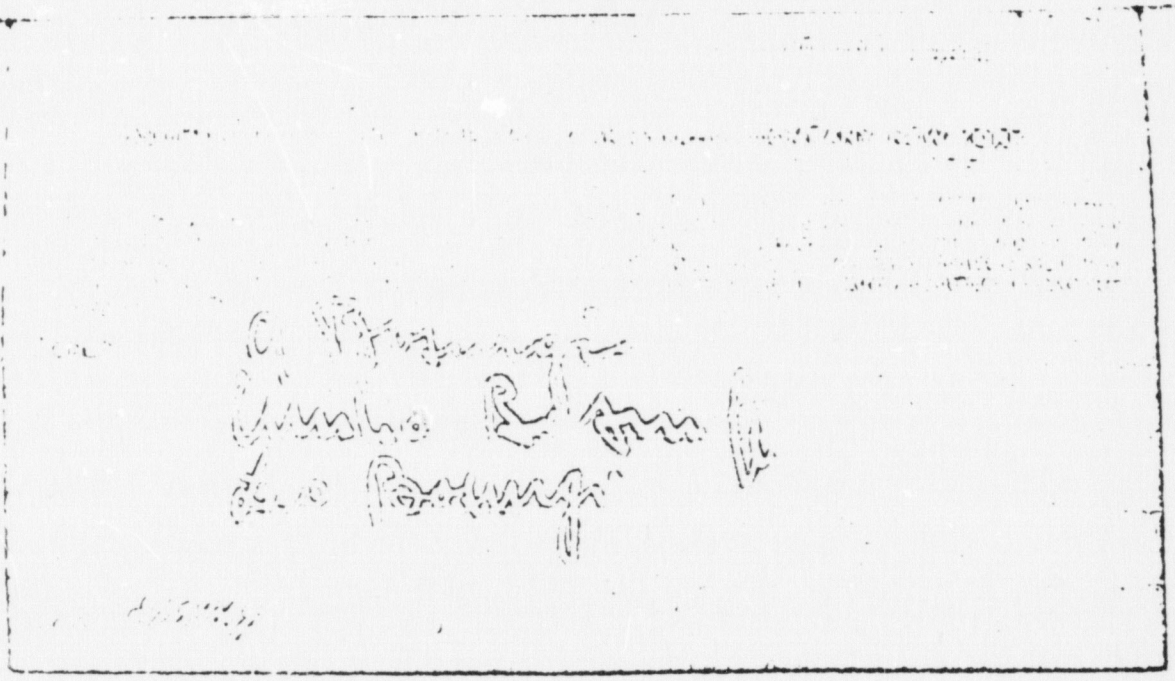


EXHIBIT B TO FOREGOING 9(g) STATEMENT
A 296

MEMORANDUM FOR CREDIT DEPARTMENT

NAME MRS. ADRIANA BOSURGI &/OR LEO BOSURGI &/OR EMILIO BOSURGI CITY

DATE- MAY 12, 1954

Mrs. Bosurgi and her son, Leo, call and speak with RCG and the writer. In line with our previous dictation, they have decided to establish a custodian account with us but instead of $50,000 they now would like to invest $400,000 and requested our suggestions for the portfolio. As they are returning to Italy on May 14th, we will have the Analysis Department furnish a listing promptly.

MAY 13, 1954

RCG and the writer call at the subject's apartment in the Savoy Plaza with our suggestions for an investment of $400,000 with an overall yield of about 5.2 (they had specified 5/6%). Mrs. Bosurgi deleted one issue, reduced another and applied the funds to a suggested Canadian issue. She executed the custodian agreement and signed the order to purchase. Stocks will be registered in nominee and income will be credited to joint account here which, after the $400,000 purchase, will be about $40,000.

MAILING INSTRUCTIONS

Mail to be kept to a minimum - one annual statement - address for custody account will be 5H.

Initial purchase statement and any subsequent necessary mail to be sent to:

Mrs. Adriana Bosurgi
Via di Priscilla 98
Roma, Italy.

Envelope must not bear bank name and be marked personal.

Apparently they own one of the largest citrus companies in Italy - Sanderson i Sons, S.P.A., Via Garibaldi 2, Messina. They manufacture citric acid, lemon concentrate and juices. In season they borrow up to $1,000,000 from Italian banks and they asked if we would be interested in lending them upon approval of their statements. After checking with A. Sherwin we explained that we could not compete with our correspondents and could consider the offer only upon their invitation or approval. The subject's domestic agent is Dodge and Olcott with whom we checked at the inception of the account.

The Bosurgis will probably return to the States in September and will stop in to see us.

WJWallace/ba

EXHIBIT C TO FOREGOING 9(g) STATEMENT

A 297

80629

1. NAME OF INDIVIDUAL, PARTNERSHIP, OR CORPORATION TO WHOM PAID	2. STREET ADDRESS / CITY	3. COUNTRY
Adriana Bocurgi	Via De Priscilla 96 / Milan	Italy

4. NAME AND ADDRESS OF PAYER SHOULD BE ENTERED HERE IF DIFFERENT FROM WITHHOLDING AGENT'S	5. NATURE OF INCOME (SUCH AS INTEREST, DIVIDENDS, ETC.)	6. GROSS AMOUNT OF INCOME PAID	7. RATE OF TAX	8. AMOUNT OF TAX WITHHELD
	Dividends	$31,712.14	15%	$ 4,756.92

9. AMOUNT OF TAX RELEASED OR REFUNDED, IF ANY
$

10. NAME AND ADDRESS OF WITHHOLDING AGENT	11. NAME AND ADDRESS OF AGENT FOR WITHHOLDING AGENT
Chemical Bank New York Trust Company 100 Broadway New York 15, New York	

Form 1042S
U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

U.S. ANNUAL INFORMATION STATEMENT OF INCOME PAID TO NONRESIDENT ALIENS, ETC. (Under Chapter 3, Internal Revenue Code)

1953

(COPY FOR INTERNAL REVENUE)

EXHIBIT D TO FOREGOING 9(g) STATEMENT

A 298

17/70:56-5

C 66629

1. NAME OF INDIVIDUAL, PARTNERSHIP, OR CORPORATION TO WHOM PAID	2. STREET ADDRESS	3. COUNTRY
Adriana Fosurgi	Via De Priscilla 98 CITY Milan, Italy	ITALY

4. NAME AND ADDRESS OF PAYER SHOULD BE ENTERED HERE IF DIFFERENT FROM WITHHOLDING AGENT'S	5. NATURE OF INCOME (SUCH AS INTEREST, DIVIDENDS, ETC.)	6. GROSS AMOUNT OF INCOME PAID	7. RATE OF TAX	8. AMOUNT OF TAX WITHHELD
	dividends	$ 9,565.35	15%	$ 1,434.73
		9. AMOUNT OF TAX RELEASED OR REFUNDED, IF ANY $		

10. NAME AND ADDRESS OF WITHHOLDING AGENT	11. NAME AND ADDRESS OF AGENT FOR WITHHOLDING AGENT
Chemical Bank NY Trust Company 100 Broadway New York, NY	

Form 1042S — U.S. ANNUAL INFORMATION STATEMENT OF INCOME PAID TO NONRESIDENT ALIENS, ETC. (Under Chapter 3, Internal Revenue Code) — 1963

U.S. TREASURY DEPARTMENT INTERNAL REVENUE SERVICE

(COPY FOR INTERNAL REVENUE)

EXHIBIT E TO FOREGOING 9(g) STATEMENT

A 299

CHEMICAL BANK NEW YORK TRUST COMPANY

INSTRUCTIONS GOVERNING THE
CUSTODIAN ACCOUNT
OF

LIONE BOSURGI &/OR EMILIO BOSURGI

A 300

Date April 10, 19

CHEMICAL BANK NEW YORK TRUST COMPANY
... YORK, NEW YORK

Dear Sirs:

You are authorized to open a custodian account in the name of the undersigned and to hold or d... of any property from whomsoever received by you for such account subject to the following instructions w... are to remain in force until expressly amended or revoked in writing by the undersigned.

INTEREST, DIVIDENDS AND OTHER MONEYS — Interest and dividends on such property are to be collected by you so far as the und... signed shall make such collection possible by the execution of dividend orders or ... means and such interest, dividends and all other moneys arising out of property in the custodian account are to be credited to the checking account of the undersigned with you.

WITHDRAWALS AND PURCHASES — All withdrawals of property from such account for any purpose and all orders to purc... property for such account or to receive the same against payment shall be made only upon the order of the undersigned unless otherwise instructed in writing satisfactory to you.

REGISTRATION OF SECURITIES — All securities in form necessitating registration are to be registered:

☒ In the name of your nominee. - CA ENGLAND & CO.

☐ In the name of the undersigned.

OWNERSHIP CERTIFICATES — In order that the income from such securities may be collected promptly, you are hereby authorized and directed to execute, as Agent and in the name of the undersigned, all necessary certificates of ownership which may be required by the income tax regulations of the United States Treasury Department now or hereafter in effect, but without claiming thereon any personal exemption. For the purpose of preparing such certificates and for other tax purposes, it is hereby certified that the present status of the undersigned is as follows:

Italy
(Citizen or Subject of)

[illegible]
(Legal Residence)

The undersigned agrees to notify you promptly in writing of any change in the above status.

EXCHANGES — You shall make any exchange of securities which, in your opinion, may be considered to be of a routine nature or which does not involve the exercise of business judgment; for example, exchanges in connection with a company's change of name or a change in par or stated value of stock and exchanges of temporary for definitive certificates.

FRACTIONAL INTERESTS — As regards any fractional interest bearing an expiration date and resulting from a stock dividend or split, you are hereby authorized

☒ to purchase an additional fractional interest sufficient to constitute one full share.

☐ to sell such fractional interest.

PROXIES — All proxies solicited by management in respect of securities that are registered in your nominee's name may be signed and mailed by you to management, unless you shall have received a contrary direction from the undersigned; but if you see fit you may instead cause any such proxy to be signed and mailed to the undersigned. Financial reports are not to be forwarded to the undersigned.

With respect to securities of foreign issue, while it is expected that you will use your efforts to collect any moneys which may to your knowledge become collectible with respect to such securities, including dividends, interest and other income, and to notify the undersigned of any call for redemption, offer of exchange, right of subscription, reorganization or other proceedings affecting such securities, it is understood that you shall be under no responsibility for any failure or delay in effecting such collections or giving such notices, whether or not the relevant information is published in any financial service available to you. All foreign currency collected in respect of such securities is, to the extent possible, to be converted into United States dollars, and in effecting such conversion you may use such methods or agencies as you may deem appropriate, including the facilities of your own International Division at customary rates. All risks and expenses incident to such collection and conversion are for the account of the undersigned, and you shall have no responsibility for fluctuations in exchange rates affecting any such conversion.

EXPENSES

The undersigned hereby agrees to be responsible for all expenses (including the cost of any property purchased for the account of the undersigned) and for all fees and to indemnify and hold harmless you and your nominee from all taxes, expenses (including counsel fees), assessments or other charges incurred by or assessed against you or your nominee in connection with this account. You are authorized to charge any account of the undersigned with you for all such items and you are hereby given a lien for all such items upon any and all funds, deposit accounts and other property of the undersigned in your possession or under your control for any purpose (including safekeeping or pledge for any liability of the undersignee).

FEES

You are to charge for your services a fee of

ON BONDS:

$ .50	per annum per $1,000 par value on first	$500,000.
.40	per annum per $1,000 par value on next	$500,000.
.25	per annum per $1,000 par value on next	$1,500,000.
.10	per annum per $1,000 par value on all over	$2,500,000.

$ .05 per annum per $1,000 par value on Treasury Bills, Certificates, Tax Notes, Savings Bonds, Notes without Coupons, Commercial Paper.

ON STOCKS:

$ .02	per annum per share on first	10,000 shares
.01	per annum per share on next	40,000 shares
.005	per annum per share on all over	50,000 shares

ANNUAL CHARGE PER ISSUE OF BONDS OR STOCKS $6.00

Minimum fee of $75 per annum. You are requested to debit any account of the undersigned with you with the amount of such fee annually.

In addition to the foregoing, you shall be entitled to the following further charges:

(a) For each issue of securities received or delivered by you (exclusive of initial deposits or closing withdrawals)—a charge of $6.00 per issue;

(b) For all transfers to or from the name of a fiduciary and for the preparation of special statements or reports—a charge commensurate with the work involved;

(c) For purchases and sales of securities negotiated in the over-the-counter market (other than United States Government Bonds and Municipal Bonds with respect to which you act as principal)—a charge equivalent to the usual broker's commission.

EXHIBIT "B"

A 302

...ONS:

All entries through checking account of Leona Bourgi &/or Emil Bourgi #005-252402.

Yours very truly,

Leona Bourgi

Emil Bourgi

cepted: 4/22/63

EMICAL BANK NEW YORK TRUST COMPANY

R. C. Ginglen

Authorized Officer

Address for all communications:

c/o R. C. Ginglen

Office 5

(3-61)

CHEMICAL BANK NEW YORK TRUST COMPANY

NEW YORK

377 Madison Avenue

DATE 4/9/63

PARTICULARS

Transfer of balance to account in the name of

Liane Bosurgi &/or Emilio Bosurgi as per instructions.

A/C NO. 003-202252

Liane Bosurgi &/or Emilio Bosurgi

Hold - 022100 5

-5-

CREDIT ADVICE 1

AMOUNT

$673,307.97

WE CREDIT YOUR ACCOUNT AS PER DETAILS ABOVE

CHEMICAL BANK NEW YORK TRUST COMPANY

BY

CHEMICAL BANK NEW YORK TRUST COMPANY

NEW YORK

377 Madison Avenue

DATE 4/9/63

PARTICULARS

Transfer of balance from account of Adriana Bosurgi &/or

Leo Bosurgi &/or Emilio Bosurgi as per instructions.

A/C NO. 003-202252

Liane Bosurgi &/or Emilio Bosurgi

Hold - 022100 5

-5-

DEBIT ADVICE 1

AMOUNT

$673,307.97

WE CHARGE YOUR ACCOUNT AS PER DETAILS ABOVE.

CHEMICAL BANK NEW YORK TRUST COMPANY

BY

TO

A/C NO. 003-202252

Mrs. Adriana Bosurgi &/or Leo Bosurgi &/or

Emilio Bosurgi

Hold - 022100 5

-5-

EXHIBIT "P"

A 304

RECEIVED OFFICE OF
CORRESPONDENCE NOV 14 1972
DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES

(TRANSLATION)

LS NO. 32429
R-XXXIV/R-XX
Spanish

[Source: Diario Oficial]

S.A.I.C.I.

Balance Sheet at December 31, 19[illegible]

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Assets		Liabilities	
Foreign shares and securities	US$[illegible]	[illegible]	US$[illegible]
Paid claims	[illegible]	Current accounts	[illegible]
			$US[illegible]
Organization expenses	[illegible]		
	US$50,900.00		

There was no Profit and Loss Statement.

The foregoing balance sheets were reproduced from page 2 of the Book of Records certified by the Public and General Registrar of Commerce on December 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1956

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	27,286.64	Profit and loss	9,318.65
Organization expenses	720.00	Current accounts	900.00
	US$60,218.65		US$[illegible]

NOV 14 1972

Profit and Loss Statement

Debit		Credit	
Organization expenses	US$ 180.00	Dividends	US$8,326.65
Profits for the year	9,313.65	Interest	1,172.00
	US$9,498.65		US$9,498.65

The profits will go into the Reserve Fund.

The foregoing balance sheets were reproduced from page 3 of the Book of Records certified by the Public and General Registrar of Commerce on December 11, 1959 and entered as No. 3253 on page 104 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1957

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	32,279.95	Profit and loss	14,031.[illegible]
Organization expenses	540.00	Current accounts	900.00
	US$64,931.96		US$64,931.96

Profit and Loss Statement

Debit		Credit	
Organization expenses	US$ 180.00	Dividends	US$4,003.20
Profits for the year	4,713.31	Interest	890.11
	US$4,893.31		US$4,893.11

The profits will go into the Reserve Fund.

The foregoing balance sheets were reproduced from page 4 of the Book of Records certified by the Public and General Registrar of Commerce on December 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

NOV 14 1972

S.A.I.C.I.

Balance Sheet at December 31, 1958

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	35,216.43	Profit and loss	19,771.03
Organization expenses	360.00	Current accounts	900.00
	US$70,688.44		US$70,671.03

Profit and Loss Statement

Debit		Credits	
Organization expenses	US$ 180.00	Dividends	US$4,578.04
Profits for the year	5,751.43	Interest	1,353.44
	US$5,931.43		US$5,931.48

The profits will go into the Reserve Fund.

The following balance sheet was approved by the Stockholders of Panorde certified by the Public and General Registrar of Companies on December 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1959

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	44,379.02	Profit and loss	25,771.03
Organization expenses	180.00	Current accounts	900.00
	US$76,671.03		US$76,671.03

4

Profit and Loss Statement

Debit		Credits	
Organization expenses	US$ 180.00	Dividends	US$4,878.04
Profits for the year	5,982.59	Interest	1,284.55
	US$6,162.59		US$6,162.59

The profits will go into the Reserve Fund.

The foregoing balance sheets are reproduced on page 6 of the Book of Records certified by the Public and General Registrar of Commerce on December 11, 1959 and entered as No. 8259 on page 104 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1960

The following balance sheets were approved by the Stockholders Meeting held on December 20, 1961.

Profit and Loss Statement

Debit		Credit	
Organization expenses	US$180.00		
Taxes	344.00		
Profits for the year	809.33	Interest	US$1,333.33
	US$1,333.33		

The profits will go into the Reserve Fund.

The foregoing balance sheets were reproduced from page 7 of the Book of Records certified by the Public and General Registrar of Commerce on December 11, 1959 and entered as No. 8259 on page 104 of Book No. 11.

A 308

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5

S.A.I.C.I.

Balance Sheet at December 31, 1961

The following balance sheets were approved by the Stockholders Meeting held on August 18, 1962.

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	47,329.69	Profit and loss	28,197.70
	US$79,441.70	Current accounts	1,244.00
			US$79,441.70

Profit and Loss Statement

Debit		Credit	
Profits for the year	US$1,617.34	Interest	US$1,617.34

The profit will go into the Reserve Fund.

This balance sheet was approved [illegible] page 9 of the Book of Minutes of Shareholders' Meetings, and registered in the Register of Companies on December 11, 1959, and entered as No. 8233 on page 101 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1962

Assets		Liabilities	
Foreign shares and securities	$US32,112.01	Paid-up capital	US$50,000.00
Foreign claims	47,329.69	Profit and loss	27,171.70
	$US79,441.70		
		Current accounts	2,270.00
			US$79,441.70

Profit and Loss Statement

Debit	
Fees	US$770.00
Taxes	256.00
	US$1,026.00

The losses will go into a new account.

[illegible]

The foregoing balance sheets were approved by the Regular General Stockholders Meeting held on April 29, 1964 and were reproduced from page 9 of the Book of Records certified on December 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

S.A.I.C.I.

Balance Sheet at December 31, 1963

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	47,329.69	Profit and loss	26,841.70
	US$79,441.70	Current accounts	2,600.00
			US$79,441.70

Profit and Loss Statement

[illegible]

The losses will go into a new account.

The foregoing balance sheets were approved by the Regular General Stockholders Meeting held on April 29, 1964 and were reproduced from page 10 of the Book of Records certified on December 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

S.A.I.C.I. (S.A. de Inversiones Comercial e Industrial)
[Industrial and Commercial Investment Company]

Balance Sheet at December 31, 1964

Assets		Liabilities	
Foreign shares and securities	US$32,112.01	Paid-up capital	US$50,000.00
Foreign claims	47,329.69	Profit and loss	26,[illegible]
	US$79,441.70	Current accounts	2,[illegible]
			US$79,441.70

A 310

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Profit and Loss Statement

Debit

Overhead	US$133.00
Fees	200.00
	US$333.00

The losses will go into a new account.

Approved by the Regular General Stockholders Meeting held on June 21, 1965. Office of the Inspector General of Finance, Corporations Division. It is hereby recorded that the foregoing balance sheets were reproduced from page 11, certified by the Public Registrar of Commerce on Dec. 11, 1959 and entered as No. 8253 on page 104 of Book No. 11.

(48 & H)

EXHIBIT H TO FOREGOING 9(g) STATEMENT

A 311

Encl. A

MOVEMENT OF THE SHARES FROM 1950 . . . . .

August 23, 1949 . . . . .

Corporate Charter of the W. Sanderson & Sons Corporation - office in Milan - original capital subscribed by :

Società Finanziaria Immobiliare Roma -

SAFIR .....Number of shares: 2750

Società in Accomandita semplice . . .

Moizzi & C°-Milano ..... " " " 1.000

Fiduciaria Milanese s.r.l.Milano " " " 1.000

Staffico Dr. Ercole - Milano " " " 250

TOTAL NUMBER OF SHARES 5.000

On December 19, 1949 "Soc.in Accomandita semplice" Moizzi &.C° trasferred number 1.000 shares to Doctor Franco Marinoni of Rome.

On December 16, 1954, on account of increase of capital, the shares were allotted as follows :

- Dr.Franco Marinoni, Roma N° 3.000
- S.A.D.A., Milano ". 500
- Dr.Virginio Bertuccioli, Roma " .2.000
- Adriana Bosurgi Canevn, Messina " 6.500
- Dr.Leone Bosurgi, Messina " 6.000
- Dr. Emilio Bosurgi, " " 6.000

EXHIBIT "H"

- Morichini Ugo, Roma	N. 2.000
- S.A.I.C.I., Montevideo	" 20.000
- S.A.F.I.R., Roma	" 2.750
- Soc. Fiduciaria Milanese	" 1.000
- Staffico Dr. Ercole	" 250
	Nº 50.000

December 30, 1954

N. 1000 shares were transferred from "Fiduciaria Milanese" to Virginio Bertuccioli.

November 17, 1956

Transfer from Morichini Ugo to :

- Dr. Leone Bosurgi N. 1000 shares
- Dr. Emilio Bosurgi N. 1000 shares

JANUARY 15, 1963

-Transfer from Franco Marinoni to Dr. Leone Bosurgi N. 3.000 shares

-Transfer from Virginio Bertuccioli to Dr. Leone Bosurgi " 3.000 shares

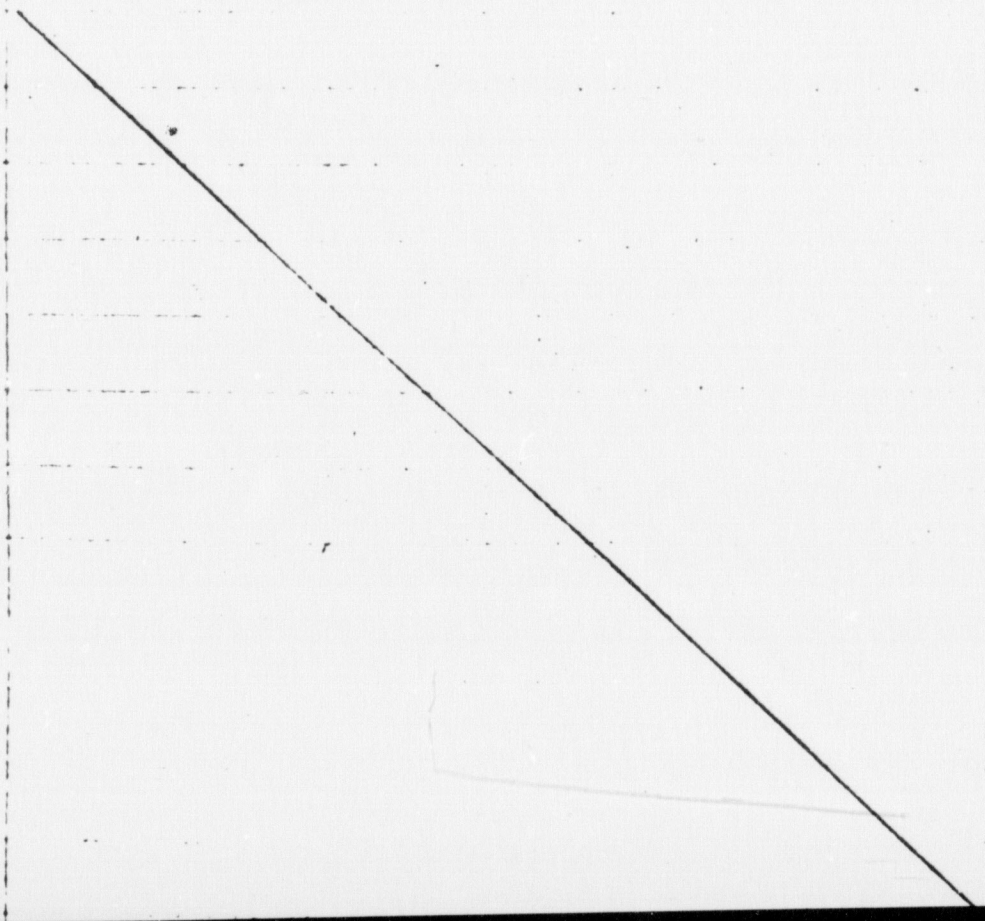
-Transfer from Caneva Adriana Bosurgi to Dr. Leone Bosurgi " 6.500 "

- From Dr. Ercole Staffico to Dr. Leone Bosurgi " 250 "

On January 15, 1963 the shares belong to :

S.A.I.C.I.	N. 20.000 SHARES
Dr. Leone Bosurgi	" 19.750 "
Dr. Emilio Bosurgi	" 7.000 "
S.A.D.A.	" 500 "
S.A.F.I.R.	" 2.750 "
	N. 50.000 SHARES

Therefore on March 27, 1963 the shares belonged to the above mentioned people and did not undergo further movements.



THE FOLLOWING EXHIBITS TO THE FOREGOING 9(g) STATEMENT ARE REPRODUCED IN THIS APPENDIX AS NOTED BELOW:

EXHIBIT "I" A-15

EXHIBIT "J" A-33

EXHIBIT "K" A-76

EXHIBIT "L" A-122

EXHIBIT "M" A-143

EXHIBIT N TO FOREGOING 9(g) STATEMENT
A 315

MIS

eb

71-3103

October 28, 1971

Samuel Gottlieb, Esq.
Gainsburg, Gottlieb, Levitan & Cole
122 East 42nd Street
New York, New York 10017

Re: Sociedad Anonima de Inversions
Commerciales e Industriales,
v. Leone Bosurgi, Emilio Bosurgi
and Benedict Ginsberg
[Index No. 22140/71]
[Sup. Ct., N.Y. Co.]

Dear Mr. Gottlieb:

We have received in the mail a copy of the complaint and Notice of Motion to consolidate and for summary judgment in the captioned case in which the United States is not named as a party.

As you are aware, the Government on March 2, 1971, commenced an action in the United States District Court to foreclose its tax liens against the sum of $215,000 which Chemical Bank agreed to pay Leon and Emilio Bosurgi in settlement of any claims the brothers may have had against the bank. The Government also moved for a preliminary injunction restraining Leon and Emilio Bosurgi from taking further action in the State Court action they had commenced against Chemical Bank. While that motion for a preliminary injunction was technically denied, the District Court's order specifically provides that Benedict Ginsberg, the attorney for the Bosurgi brothers, shall hold the $215,000 in Certificates of Deposit "in escrow subject to and impressed with any and all liens of the United States of America and subject to any further order of this Court which may be made with regard to the rights of the United States of America and any other claimant to the said $215,000." This order was entered on March 18, 1971.

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71-3103

The action commenced by your client on or about May 27, 1971 shows that your client claims title to the $215,000. While the order of the District Court specifically provides for the litigation of your client's claim, the United States has not been made a party to your action in the state court. Consequently, any final order of the state court will not be res judicata or collateral estoppel with respect to the rights of the United States. Moreover, Benedict Ginsberg may not pay over the $215,000 that he holds in escrow, or any lesser part thereof, even if the state court should find that your client is entitled to the money. By pursuing the action in the state court then, your client will have to litigate twice his claimed right, title and interest to the amount that Benedict Ginsberg holds in escrow under the order of the District Court. We suggest, therefore, that the most expedient way for all concerned to litigate the question of title to the fund involved here is to present it to the District Court. Accordingly, within the next few days the Government will amend its complaint in the District Court to add both your client and Benedict Ginsberg. Furthermore, we suggest that your action in the state court be discontinued and that all the parties pursue their rights in the District Court.

We await your response to this suggestion.

Very truly yours,

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

By:
MICHAEL I. SALTZMAN
Assistant United States Attorney
Chief, Tax Unit

cc:
Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, N.Y. 10017

John Lucido, Esq.
Cravath, Swaine & Moore
1 Chase Manhattan Plaza
New York, New York 10005

MIS:eb
71-3103

Hon. William Kapelman
Bronx Supreme Court
851 Grand Concourse
Bronx, N.Y.

EXHIBIT O TO FOREGOING 9(g) STATEMENT

A 318

MLS

feh

November 12, 1971

Samuel Gottlieb, Esq.
Messrs. Gainsburg, Gottlieb, Levitan & Cole
122 East 42nd Street
New York, New York 10017

Re: Sociedad Anonima de Inversiones
Comerciales e Industriales v.
Leone Bosurgi, Emilio Bosurgi and
Benedict Ginsberg
Index No. 22140/71
Supreme Court New York County

Dear Mr. Gottlieb:

This is in response to your letter dated November 5, 1971. In the last paragraph of the letter you hold out the possibility of a stipulation on "the most effective procedural course to be pursued" in disposing of the claims of your client, Benedict Ginsberg, and the United States. We welcome the possibility of meeting with you and the other parties at a mutually convenient time for just such a purpose.

You also question, in your letter, how the claim of your client and the claim of Mr. Ginsberg can be effectively determined in the federal court. Steps have already been taken to amend Government's complaint in the District Court to add your client and Mr. Ginsberg as parties defendant. When service of the amended complaint is effected, all parties interested in the fund of $215,000 will be in the District Court where the claims of the respective parties can be determined on the merits.

The interests of your client are served since the state court in which it is presently proceeding lacks jurisdiction to hear and determine its claim against the Bosurgis and Chemical Bank. The sole basis for the jurisdiction of the state court is in rem jurisdiction purportedly obtained by the service of a writ of attachment upon Benedict Ginsberg, the holder of the fund. The state court hearing the case between the Bosurgis and Chemical Bank did not purport to exercise jurisdiction over the fund since that action was in personam. However, at the time that the writ of attachment was served on Mr. Ginsberg, the fund was then in the custody of the District Court pursuant to its Order of March 18, 1971, and, pursuant to that Order, Benedict Ginsberg was only the holder of the fund as an escrow agent of the District Court. Thus, the state court has never obtained jurisdiction over the fund, and any action that it may take on your motion will be invalid. This is precisely the position we took in the summer meeting held in the chambers of Mr. Justice Kapelman.

The Vernitron case on which you rely to support the state court's jurisdiction is clearly inapposite. In Vernitron, three days before the return date of plaintiff's summary judgment motion in a contract action, the defendant began a separate action involving the same transaction in federal court and also sought a federal court injunction of the state court proceedings. The Second Circuit held that it was improper to enjoin the state court under 28 U.S.C. §2283 merely because that court might decide factual issues and collaterally estop a party from trying those issues again in the federal action.

First, in Vernitron, both the state court and the federal court had jurisdiction over the actions. Here, the state court lacks jurisdiction since the federal court obtained jurisdiction over the res first. Thus, any determination of factual issues by the state court would be invalid, and would have to be relitigated in the federal court.

Second, in Vernitron, the parties in the state and federal courts were the same. Here, the moving party in the federal court is not a party in the state court action. Thus, collateral estoppel can not prevent the United States from litigating in the federal court the factual issues tried without its presence in the state court.

Third, in Vernitron, no allegation was made that the stay was necessary to protect the federal court's judgment. In this case, were the state court to decide the issues, the fund might be distributed, and, even though such distribution would violate the federal court order, distribution might destroy the in rem jurisdiction of the federal court over the Society, as well as the effectiveness of the federal court's final judgment.

You mention that Mr. Justice Kapelman is familiar with this case and, therefore, is the appropriate one to hear and decide the case. Even if this is so, the parties may not confer jurisdiction on the Court where there is, in law, no jurisdiction. Moreover, Mr. Justice Kapelman has not heard the merits of your client's claim, only the matters with regard to the claim of the Bosurgis and the Chemical Bank. We believe there is nothing to prevent the District Court from effectively deciding these quite different issues.

The claim of Mr. Ginsberg is likewise most properly heard in the District Court. Assuming that the Bosurgis were the owners of the fund in question, then whether or not Mr. Ginsberg is entitled to super priority over the Government's tax lien pursuant to Section 6323(b)(8) of the Internal Revenue Code, must be determined. That is a federal question. If Mr. Ginsberg is entitled to such super priority, then he is only entitled to "reasonable compensation" for procuring the settlement. Even if the state court were to allow Mr. Ginsberg his fee, the District Court

which has jurisdiction over the fund would have to decide whether or not that fee was "reasonable compensation" under Section 6323 of the Code. In short, there would have to be two hearings on the same question, and we do not believe that such circumstance is an efficient use of the judicial machinery available.

For these reasons, we accept your offer to meet and discuss a way of cutting through the procedural thicket which has grown up in this matter.

Very truly yours,

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

By:
MICHAEL I. SALTZMAN
Assistant United States Attorney
Chief, Tax Unit

cc:
Hon. William Kapelman
Bronx Supreme Court
851 Grand Concourse
Bronx, N. Y. 10451

Hon. Samuel J. Silverman
Supreme Court
60 Centre Street
New York, N. Y. 10007

Benedict Ginsberg, Esq.
475 Fifth Ave.
New York, N. Y. 10017

Cravath, Swaine & Moore, Esqs.
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attn: John A. Lucido, Esq.

EXHIBIT P TO FOREGOING 9(g) STATEMENT

A 322

MIS

71-0572

eb

February 9, 1972

Hon. William Kappelman
Justice, Supreme Court of
the State of New York
851 Grand Concourse
Bronx, New York 10451

Re: United States of America
v. Bosurgi, et al.

Dear Mr. Justice Kappelman:

I submit herewith the latest chapter in correspondence exchange in the captioned case. Mr. Gottlieb has purported to describe the events which have occurred to date in the captioned case. I set forth below my clarifications of and/or amendments to Mr. Gottlieb's account:

1. The Society annexed certain documents to its complaint purporting to establish its claim to the settlement fund. The Government has exchanged or supplied information contrary to the documentary matter submitted by the Society. We believe that this exchange was carried on "in the same spirit of candor" displayed by Mr. Gottlieb.

2. The claim is made that the Government failed to give notice before obtaining an order providing for service of the Society in the federal action. Mr. Gottlieb neglects to tell the Court that no notice to either the Society or Mr. Ginsberg was required for the Government to amend its complaint in the federal action since neither the Society nor Mr. Ginsberg were parties to the original complaint. Furthermore, the Government has

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always taken the position that, consistent with the federal court's order, the Society and Mr. Ginsberg should present their claims in the federal court. Consequently, the Government's action was neither improperly ex parte nor surreptitious, if that implication was intended by Mr. Gottlieb.

3. Mr. Gottlieb has indeed heard nothing from us with regard to an appointment in the Internal Revenue Service's appellate Division, other than that we have unsuccessfully attempted to arrange a conference date. The reason is that at this time of year the Internal Revenue Service is understandably busy and the Appellate Conferee who is to represent the Internal Revenue Service at the conference is simply unavailable for a time.

4. Mr. Gottlieb is quite correct in stating that the Government has not responded to his letter of January 25, 1972 to Judge Weinfeld. We are not going to begin another letter-writing exchange in the federal court. This current exchange in the state court is quite sufficient. Furthermore, Mr. Gottlieb has not indicated anything to which we need to respond. The Government is not required to accept Mr. Gottlieb's invitation to litigate the matter in the state court. After all, the Government commenced its action in the federal court before the Society's action in the state court was begun.

We trust that this letter will suffice for the time being as the Government's contribution to this "trial by correspondence."

Respectfully,

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

By:
MICHAEL I. SALTZMAN
Assistant United States Attorney
Chief, Tax Unit

MIS:eb
71-0572

A 324

cc:

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Samuel Gottlieb, Esq.
Gainsburg, Gottlieb,
Levitan & Cole
122 East 42nd Street
New York, New York 10017

Cravath, Swaine & Moore, Esqs.
1 Chase Manhattan Plaza
New York, New York 10005
Attention: John A. Lucido, Esq.

MR LAND
71-0572

A 325

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LEONE BOSURGI, et al. Defendants.	(K.T.D.) 71 Civ. 928 MOTION OF DEFENDANT CHEMICAL BANK FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, upon the complaint and answer thereto of defendant Chemical Bank New York Trust Company (Chemical) and the prior proceedings herein, Chemical will move this Court on February 20, 1974, at 2:15 p.m. in Room 110, United States Courthouse. Foley Square, New York, N. Y. (Hon. Kevin T. Duffy) pursuant to Fed R. Civ. P. Rule 56 for judgment dismissing this action, the complaint and each of the claims and causes of action asserted therein against it and for such other and further relief as may be just. Papers in opposition must be served and filed as prescribed by General Rule 9 of the Court.

February 6, 1974

CRAVATH, SWAINE & MOORE,

by John R Thompson

A member of the firm
Attorneys for Defendant
Chemical Bank New York
Trust Company,
One Chase Manhattan Plaza
New York, N. Y. 10005

TO:
UNITED STATES ATTORNEY FOR
THE SOUTHERN DISTRICT OF
NEW YORK
United States Courthouse
Foley Square,
New York, N. Y. 10007

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Defendant
Sociedad Anonima De Inversiones
Comerciales E Industriales
122 East 42 Street
New York, N. Y. 10017

BENEDICT GINSBERG
Appearing Pro Se ~~and as Attorney for Defendants Leone and Emilio Bosurgi~~
475 Fifth Avenue
New York, N. Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

Plaintiff,

71 Civ. 928 (KTD)

-against-

LEONE BOSURGI, et al.,

DEFENDANT SAICI'S STATEMENT PURSUANT TO RULE 9(g)

Defendants.

- -x

Defendant SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES by its attorneys GAINSBURG, GOTTLIEB, LEVITAN & COLE, in opposition to the motion of the plaintiff UNITED STATES OF AMERICA for summary judgment for its statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York with respect thereto:

1. Contends, as does the plaintiff UNITED STATES OF AMERICA, that there are no material facts as to which there exists a genuine issue to be tried, such material facts having heretofore been set forth in SAICI's papers in support of its application for summary judgment before this Court.

2. That the "facts" set forth in plaintiff's statement pursuant to Rule 9(g), paragraphs 2, 3, 6, 7, 8 and 9 are not material; moreover, they are not admissible and

not at issue in these proceedings inasmuch as they are based on documentary hearsay and, accordingly, are deemed controverted.

Dated: New York, N. Y.
March 26, 1974

Yours, etc.,

GAINSBURG, GOTTLIEB, LEVITAN & COLE

A Member of the Firm
Attorneys for Defendant SAICI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

----------x

71 Civ. 928 (KTD)

DEFENDANT GINSBERG'S STATEMENT PURSUANT TO RULE 9(g)

Defendant BENEDICT GINSBERG, appearing pro so, in opposition to the motion of the plaintiff UNITED STATES OF AMERICA for summary judgment, and in support of his motion (a) to dismiss the complaint as against him, and (b) for an order authorizing and permitting him to distribute the funds in his possession which he holds pursuant to the order of Judge Dudley B. Bonsal, made March 18, 1971, and in accordance with the order of Mr. Justice William Kapelman, made December 12, 1973, for his statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, contends:

1. That there are no material facts with respect to which there is a genuine issue to be tried, all material facts having heretofore been set forth in his papers in support of his application before this Court, to dismiss the plaintiff's complaint as against him, and to authorize him

to distribute the funds which he holds pursuant to the order of Judge Dudley B. Bonsal made March 18, 1971, such distribution to be made in accordance with the order of Mr. Justice William Kapelman made December 12, 1973.

2. That the "facts" set forth in plaintiff's statement pursuant to Rule 9(g), paragraphs 2, 3, 4, 6, 7, 8 and 9 are not material, and in addition, as hearsay, they are not admissible, and are deemed controverted.

Benedict Ginsberg, in support of his aforesaid motion to authorize him to distribute the funds described above, contends there is no genuine issue to be tried in respect of the following material facts:

A. In December 1966 Leone Bosurgi and Emilio Bosurgi retained Benedict Ginsberg as their attorney (pursuant to Exhibit A), to institute suit against Chemical Bank to recover damages because of the Bank's conversion of securities owned by the Bosurgis and its fraud in inducing them to execute documents which it thought would serve to ratify its misconduct.

B. Benedict Ginsberg instituted suit on behalf of the Bosurgis for the relief described in A above.

C. After many complex and involved proceedings, numerous motions, appeals, extensive depositions in New York City and in Rome, Italy, the case came on for trial before

Mr. Justice Kapelman in Supreme Court, New York County, on September 15, 1970.

D. At an all-day conference before Judge Kapelman on September 15, 1970, settlement was agreed upon, with the Bank to pay the sum of $215,000 to Benedict Ginsberg, to be held by him in escrow on stated conditions.

E. The Bank failed to comply with the terms of the stipulation; the United States of America brought a proceeding in this Court to obtain the said $215,000. Judge Dudley B. Bonsal of this Court, by order made March 18, 1971, denied the application of the U.S.A. and directed the Bank to pay said sum to Benedict Ginsberg, as escrowee, the money to be invested in Certificates of Deposit, and held by Benedict Ginsberg subject to further order of this Court.

F. On the Bank's appeal from Judge Bonsal's order, the Court of Appeals unanimously affirmed. The Bank then paid the said sum to Benedict Ginsberg, who invested it in Certificates of Deposit, as directed in Judge Bonsal's order. Said sum as so invested, with the accruals thereon similarly invested, now amounts to $258,073.63, as of April 2, 1974.

G. By reason of the commencement of an action against the Bosurgis by a foreign corporation known as SAICI, it became necessary for Benedict Ginsberg to apply to the Supreme Court, New York County, where Bosurgi v. Chemical Bank was settled, to fix his fee, preliminary to an application in this Court for leave to withdraw from the escrow

moneys, the amount of the fee as so fixed.

H. The said application of Benedict Ginsberg was brought on before Mr. Justice Kapelman by motion, notice of which was duly given to, among other, Chemical Bank and the U. S. attorney, for the Southern District of New York, on whose behalf Assistant U. S. Attorney Saltzman appeared before Mr. Justice Kapelman to urge the denial of the application of Benedict Ginsberg to have his fee fixed. His position was described in Mr. Justice Kapelman's opinion as follows:

> "The government maintains that the most expeditious manner of disposing of the issues is to litigate the title to the fund in the Federal Court. Ginsberg maintains that the State Supreme Court, where the earlier action was litigated, is the only court that has the power to fix his attorney fees."

I. Mr. Justice Kapelman denied the application. Benedict Ginsberg appealed to the Appellate Division of the Supreme Court of the State of New York.

J. By letter dated September 14, 1973, addressed to the Justices of the said Appellate Division, Assistant U.S. Attorney Land requested that Court to affirm the order of Mr. Justice Kapelman.

K. By order made November 8, 1973, the said Appellate Division modified Judge Kapelman's order to the extent of a remand for a hearing to determine the fixation of Benedict Ginsberg's fee.

L. The said Appellate Division said in its order:

"...we find no impediment to this court's determining an issue of fact competently before it regardless of peripheral federal questions. Venitron Corp. v. Benjamin, 440 F.2d 105 (2nd Cir.) Cert. Den. 402 U.S. 987, 91 S.Ct. 1664, 29 L.Ed. 2d 154. And it is clearly so when the plaintiff herein has not been stayed by a Federal Court order".

M. On November 15, 1973 a hearing was held before Mr. Justice Kapelman on the remand directed by the Appellate Division to fix the fee of Benedict Ginsberg. Said hearing was held upon notice duly given to, among others, Chemical Bank and the U. S. Attorney.

N. On said hearing the testimony of Benedict Ginsberg was taken as to the nature and extent of his services and there was introduced in evidence, among other things, the retainer described in A above (Exhibit A hereof), and a letter signed by the Bosurgis (Exhibit B hereof) on August 12, 1971, after the settlement of the action for $215,000, confirming Benedict Ginsberg's fee at $17,500, which had been originally paid, plus a contingent fee of 40%, less said $17,500, as specified in said letter, the contingency to apply to the interest accruing on the $215,000, as well as to the principal.

O. Mr. Justice Kapelman thereafter directed the entry of a final judgment, which was entered December 12, 1973, which provides, among other things, that Benedict Ginsberg is entitled to $68,080.37, plus 35% of all interest accruing on the investment of the settlement sum of $215,000, plus unreimbursed expenditures of $994.50.

Dated: New York, N. Y.
April 3, 1974.

Respectfully yours,

BENEDICT GINSBERG
Appearing Pro Se

Exhibit A - Retainer Annexed To
Foregoing Affidavit

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Dear Sirs,

We hereby retain your services to represent us in connection with a legal action to be instituted against Chemical Bank New York Trust Company and, if deemed appropriate by you, against other defendants to recover damages sustained by us in connection with certain loans and other investments principally involving Exhibitions de France, Inc. and one Leslie Winkler.

In consideration of the services rendered and to be rendered by you in connection with said action and the preparation thereof, the following terms of compensation, which we are hereby confirming, have been agreed upon between us.

1. You will receive a fixed fee totalling $17,500.00, payable as follows:

   $8,500.00 - immediately,

   $4,500.00 - prior to the commencement of pre-trial proceedings,

   $4,500.00 - when the case is placed on the trial calendar or, if the litigation terminates earlier, upon its termination.

2. In addition to said fixed fee, you will receive a contingent fee equivalent to 40% of that portion of the amounts recovered by way of judgment or settlement, which is in excess of $17,500 and of disbursements hereafter incurred.

3. The foregoing fixed fees and contingent fees shall be deemed also to constitute full compensation for such services as may hereafter be rendered in this matter by

A 335

Annexed to foregoing Affidavit

August 12, 1971

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Bosurgi v. Chemical Bank

Dear Sir:

This will confirm our understanding with respect to fees in the above matter.

Pursuant to the terms of our retainer, dated December 1966, you were to receive and you have received the sum of $17,500. You were also to receive a contingent fee of 40% of the amount of the recovery in excess of said sum of $17,500 and of the disbursements thereafter incurred, which, if advanced by you, would be reimbursed by us. Total disbursements were incurred in the amount of $2,984.65. Accordingly, your 40% is to be computed on the total recovery in excess of $17,500 plus $2,984.65, to wit, $20,484.65. You were holding in escrow a certificate of deposit issued April 29, 1971 by Chase Manhattan Bank in the amount of $215,000. 40% of the net of $215,000 minus $2,984.65 is $77,806.14. You are to receive that sum plus $994.05, which you spent in disbursements not previously reimbursed to you. You are also to receive 40% of the sums which have accrued or will hereafter accrue on the $215,000 and on the increment thereof.

Yours truly,

Leone Bosurgi

P.S. I acknowledge receipt of a photocopy of the renewed Certificate of Deposit dated July 28, 1971 in the amount of $217,485.94, which amount represents the sum originally deposited together with accrued interest thereon to July 28, 1971. I understand that you will "roll over" this amount, from time to time, until you are permitted by an appropriate order of the court to disperse the funds.

Leone Bosurgi

MFL:cb
71-0572

Filed
4/10/74

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE ROSSETTI, et al.,

Defendants.

STATEMENT PURSUANT TO RULE 9(g) IN RESPONSE TO DEFENDANT GINSBERG'S MOTION FOR SUMMARY JUDGMENT

71 Civ. 928 (KTD)

- x

The plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its Statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, in response to the numbered paragraphs in "Defendant Ginsberg's Statement Pursuant to Rule 9(g)" dated April 3, 1974, contends that there exists a genuine issue to be tried in respect to the following material facts in which the truth of defendant Ginsberg's 9(g) Statement is not admitted:

1. In respect to paragraph one of defendant Ginsberg's 9(g) Statement wherein it is stated: "... all material facts having heretofore been set forth in his papers ...", the plaintiff is uncertain as to the precise scope of "all material facts" in "his papers" and accordingly plaintiff is unable to make a short and concise statement as required by Rule 9(g) in respect to paragraph one of defendant Ginsberg's 9(g) Statement.

2. In respect to paragraph two of defendant Ginsberg's 9(g) Statement, plaintiff respectfully contends that the matters set forth in the United States' Statement Pursuant to Rule 9(g) are material and admissible.

3. In respect to the lettered subparagraphs of paragraph two of defendant Ginsberg's 9(g) Statement, the United States respectfully states: (A) Admits the truth of subparagraph A, but denies that Exhibit A was signed by anyone insofar as no signature appears thereon and denies that Exhibit A was ever dated as no date appears thereon; (B) admits the truth of subparagraph B; (C) admits the truth of subparagraph C, except denies that there were many complex and involved proceedings; (D) admits the truth of subparagraph D, except states that the "all-day" conference was less than eight hours; (E) denies that the Bank failed to comply with a stipulation, and in respect to the proceedings in this Court respectfully refers to the actual proceedings; (F) admits the truth of subparagraph F of defendant Ginsberg's 9(g) Statement and accepts the stated value of the fund subject to an accounting; (G) denies that it was necessary for Mr. Ginsberg to apply to the state court to fix his fee because Mr. Ginsberg was joined as a defendant in this Court pursuant to mandatory federal law which federal court has sole jurisdiction to fix his fee to be paid out of the fund subject to the exclusive

jurisdiction of this Court; (H) denies that notice of the state court proceedings was duly given to the United States, denies that the United States appeared in the state court proceedings, and respectfully refers to paragraph 13 of the United States' 9(g) Statement for the scope of the United States' participation before the state court; (I) admits the truth of subparagraph I of defendant Ginsberg's 9(g) Statement but states with respect to defendant Ginsberg's appeal to the Appellate Division that defendant Ginsberg did not serve the United States with his appellate brief or record on appeal, and for that reason defendant Ginsberg denied to the United States the opportunity to intervene as a party on such appeal or to appear as an amicus curiae; (J) admits the truth of subparagraph J of defendant Ginsberg's 9(g) Statement, but states that such letter was returned to the United States by the Clerk of the Appellate Division and not received by the Justices of the Appellate Division, and that the United States was apprised of defendant Ginsberg's prosecution of his appeal to the Appellate Division by a telephone call from counsel to Chemical Bank after the appeal was presented to such court; (K) and (L) admits the truth of subparagraphs K and L of defendant Ginsberg's 9(g) Statement, but respectfully refers to the order of the Appellate Division for its entire content and such court's prior opinion in respect thereto; (M) admits the

truth of subparagraph M of defendant Ginsberg's 9(g) Statement, but denies that such hearing was held on duly given notice to the United States; and (N) and (O) in respect to the matters set forth in subparagraphs N and O of defendant Ginsberg's 9(g) Statement denies that there was any evidence in respect of the reasonableness of defendant Ginsberg's fee and denies that the Court found that the fee allowed was in fact reasonable.

4. In respect to all state court proceedings involving defendant Ginsberg's application for and subsequent allowance of a fee, contends that the United States is not bound by any of such proceedings because the state court did not have personal jurisdiction of the United States, the state court did not have subject matter jurisdiction of the fund from which defendant Ginsberg's fee may be paid, the United States was not named as a party thereto, the United States was not joined as a party thereto, no state court pleadings by defendant Ginsberg set forth the interest of the United States which could be affected by such proceedings, the United States did not have any legal right to intervene in such proceedings until and unless this Court vacated its orders of March 2, 1971 and March 18, 1971, the United States had no legal right to stay such proceedings, the United States did not appear in such proceedings, and the defendant Ginsberg has intentionally waived any claim that the United States could be or was

bound by such state court proceedings insofar as defendant Ginsberg has failed to plead in this Court such affirmative defenses and move to plead such affirmative defenses.

5. At no time in the state court proceedings was there any evidence or finding that an attorney's fee allowed to defendant Ginsberg was reasonable.

6. By order of this Court dated November 15, 1973, the United States was stayed from proceeding with discovery in respect to the reasonableness of defendant Ginsberg's application for an allowance of an attorney's fee, and thus the United States was foreclosed from the opportunity to ascertain the reasonableness of the amount of defendant Ginsberg's claim for an attorney's fee.

7. Defendant Ginsberg has refused to discuss the possibility of a settlement of his fee.

Dated: New York, New York
April 9, 1974

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States of America

By: DAVID P. LAND
Assistant United States Attorney

DPL:eb
71-0572

A 341

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LEONE BOSURGI, et al.,

Defendants.

: AFFIDAVIT IN SUPPORT OF CONTENTION THERE IS A GENUINE ISSUE OF MATERIAL FACT TO BE TRIED

71 Civ. 928 (KTD)

- - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and represent the United States of America in this action.

2. In respect to the recent positions asserted by SAICI and Benedict Ginsberg in support of their pending motions for summary judgment, it now appears that there exists a genuine issue of material fact to be tried.

3. SAICI asserts that it is entitled to summary judgment because the Appellate Division of the state court granted SAICI's motion for summary judgment. By reason of the Appellate Division's opinion, SAICI asserts that it and not the Bosurgi brothers owned the $215,000 settlement fund. SAICI asserts that the United States is bound by that determination and therefore the tax claim against the Bosurgis must fail.

4. Benedict Ginsberg represents three distinct interests. He was appointed by this Court as the custodian of the $215,000 fund for investment purposes and he continues to be the custodian. He represents the Bosurgi brothers in SAICI's state court action against them. He is an adverse claimant to a portion of the $215,000 fund because of a claim for an attorney's fee. In respect to his third interest, Mr. Ginsberg asserts that he is entitled to summary judgment because the Appellate Division of the state court granted his motion for allowance of an attorney's fee and his fee was fixed by the state court. He asserts that the United States is bound by that determination.

5. As to the claims of SAICI and Benedict Ginsberg that the United States is bound by the state court proceeding, the United States set forth in its prior memorandum that as a matter of law based upon the undisputed facts the United States was not bound by the state court proceedings.

6. The United States now asserts that the state court proceedings upon which SAICI and Benedict Ginsberg rely may have been collusive against the interests of the United States. It is established that state court proceedings otherwise binding on the United States, are not binding if such proceedings were collusive against the interests of the United States. Flitcroft v. Comm., 328 F. 2d 449 (9th Cir. 1964). The United States' claim of possible collusion was not previously made because the

facts supporting a claim of possible collusion were not made known until the recent submissions by SAICI and Benedict Ginsberg.

7. The claim of possible collusion is based upon the following facts of which there appears to be no dispute.

8. Adriana Bosurgi maintained in her individual name a securities account at Chemical Bank from May 13, 1954 until March 27, 1963 when she died. Her account was transferred to her two sons, Leone and Emilio Bosurgi. In 1966 the Bosurgi brothers sued Chemical Bank in the state court for money damages based upon alleged mismanagement by Chemical Bank of that account. Mr. Ginsberg was the Bosurgis' attorney. That action was settled in early 1971 upon Chemical Bank's promise to pay to the Bosurgis the sum of $215,000. During the six years of that litigation, there appeared to be no assertion or inference that anyone other than Adriana Bosurgi or subsequently her two sons owned the securities account. The income taxes in respect to the securities account were paid on the basis that solely Italian individuals, i.e., the Bosurgis, owned the securities account. Thus, any subsequent assertion by the Bosurgi brothers that they and their mother did not really own the securities account interjected for the purpose of defeating the present tax claim after the tax claim was made known is inherently suspect. If such assertion is made in a legal

proceeding not conducted in good faith, but only for the purpose of obtaining judicial approval of the assertion, then collusion may be present.

9. When the United States commenced this tax collection action in March 1971, it obtained a federal court order subjecting the $215,000 settlement fund to the jurisdiction of this Court. Mr. Ginsberg, the Bosurgis' attorney in their state court action against Chemical Bank, was appointed the custodian of the fund solely for investment purposes. Mr. Ginsberg had no authority to subject that fund to the state court's jurisdiction, but he attempted to do so on behalf of the Bosurgis.

10. The United States was having difficulty effecting personal service of its complaint upon the Bosurgis. Mr. Ginsberg refused to accept the complaint on their behalf asserting that he was not authorized to do so. The Bosurgis have never appeared in this action, and the United States obtained an in rem default judgment on the $215,000 settlement fund.

11. In about June 1971, SAICI, a Uruguayan corporation, commenced an in rem action in the state court to recover the $215,000 fund from Benedict Ginsberg (the federally appointed custodian) and the Bosurgi brothers.

12. The manner in which SAICI's state court action was commenced suggests collusion. SAICI sued Mr. Ginsberg as the federally appointed custodian of the fund. SAICI, as a corporation, learned about Benedict

Ginsberg's holding of the $215,000 fund only because that fact was communicated to an officer, director, employee or agent of SAICI. Presumably, neither Chemical Bank nor Benedict Ginsberg communicated this fact to SAICI because they did not know of SAICI's existence prior to the service of SAICI's complaint. It is likely that the Bosurgi brothers, between March and June of 1971, obtained actual knowledge of this federal court action and the appointment of a custodian. The Bosurgi brothers, in turn, probably informed SAICI of these facts for the purpose of putting into motion SAICI's claim that SAICI owned the securities account. If in fact SAICI owned the securities account by reason of a long outstanding trust relationship with the Bosurgis, it is incredible that the Bosurgis would intentionally default in this action. The normal and expected response would be for the Bosurgis to assert that as a defense to the United States' complaint. Although the Bosurgis were unwilling to appear in the federal action, they were more than willing to appear in the state court action when they were sued by SAICI. Mr. Ginsberg, who refused to represent the Bosurgis in this action, voluntarily accepted on behalf of the Bosurgis, SAICI's state court complaint. SAICI's attorney simply mailed its complaint to Mr. Ginsberg. It is improbable that the Bosurgis would be willing litigants in the state court, but not the federal court, if the real effect of both actions was to divest the Bosurgis of any interest in the $215,000 settlement fund. It would be

incredible for the Bosurgis to hire Mr. Ginsberg and pay him a fee solely for the purpose of truly divesting themselves of $215,000 by reason of SAICI's suit.

13. If the Bosurgis informed SAICI of the pending federal suit, then the Bosurgis' answer to SAICI's complaint suggests impropriety. SAICI's state court complaint annexed as an exhibit the purported trust agreement of 1954 between SAICI and the Bosurgis. It is unlikely that Mr. Ginsberg would represent the Bosurgis in that action unless he first communicated with them about it. In order to answer SAICI's complaint, Mr. Ginsberg must have communicated with the Bosurgis about the complaint. The Bosurgis, of necessity, gave Mr. Ginsberg sufficient information to enable him to answer the complaint in a manner which he thought was truthful. An examination of the complaint and answer (pp. 33-38 and 49-51 of the state court record on appeal) shows that the answer was a denial under oath of the merits of SAICI's claim and that Mr. Ginsberg's most recent assertion to the contrary is not accurate. The heart of the answer is paragraph 6, which states:

> "Defendants, by their attorney, Benedict Ginsberg, answering the complaint ... 6. Denies each and every allegation contained in paragraphs "17" and "18" of the complaint, except that such denial by the defendant Ginsberg is on information and belief.

Paragraphs 17 and 18 of the complaint alleged as follows:

> "17. The said $215,000 ... constitutes the property of plaintiff by virtue of the aforesaid trust agreement.

18. Defendants Leone Bosurgi and Emilio Bosurgi have no interest in said fund other than as former trustees thereof for and on behalf of plaintiff."

Mr. Ginsberg's affidavit annexed to the answer stated in part: "... the same is true to his own knowledge, except as to the matters stated to be alleged on information and belief, and that as to those matters he believes it to be true." Thus, it would seem clear that Mr. Ginsberg is swearing to the fact that with respect to the allegations of paragraphs 17 and 18 (that the Bosurgis were SAICI's trustees) the Bosurgis told him that such allegations were completely false, that on behalf of them he could without qualification deny those allegations, and that based upon such statement by the Bosurgis, Mr. Ginsberg (as a separate defendant) could on "information and belief" (which he swears he believes to be true) deny those allegations. If SAICI really owned the securities account of which the Bosurgis were trustees, then either (1) the information communicated to Mr. Ginsberg by the Bosurgis was false, or (2) Mr. Ginsberg never did in fact communicate with the Bosurgis before representing them in SAICI's action, which would render his affidavit to the answer of dubious value, or (3) the Bosurgis told Mr. Ginsberg that such a trust relationship existed which would likewise render Mr. Ginsberg's affidavit of dubious value. Thus, if such a trust existed, of necessity someone made a false statement in connection with a legal proceeding.

14. In September 1971, Mr. Ginsberg wrote a letter (R. 70), to SAICI's counsel purporting to authenticate the genuineness of the trust documents between SAICI and the Bosurgis. The information set forth in the letter is wholly inconsistent with the Bosurgis' answer to SAICI's complaint. That inconsistency has not been explained by Mr. Ginsberg.

15. In October 1971, SAICI moved for summary judgment in the state court. The motion was based solely upon the purported trust documents, Mr. Ginsberg's September 1971 letter, and the affidavit of Mr. Gottlieb, SAICI's counsel. The Bosurgis did not contest that motion. Mr. Justice Kapelman denied the motion.

16. In respect to Mr. Gottlieb's purported knowledge about SAICI, it appears that Mr. Gottlieb has little, if any, knowledge. In a telephone conversation that I had with Mr. Gottlieb, he told me the purported trust documents were given to him by some law professor, that he had not seen the originals, and that he made no independent verification of their authenticity. Mr. Gottlieb would not identify the name of the law professor and he refused to give me any information at all about SAICI. Mr. Gottlieb's lack of knowledge about SAICI is carried through in SAICI's current motion for summary judgment. SAICI comes forward with no books, records, or other data to support its claim other than the purported trust documents given to him by the law professor.

17. Thus, SAICI's entire claim hinges on (1) the credibility of the Bosurgis' purported statements made to Mr. Ginsberg which are inconsistent with their verified answer, and (2) the authenticity of the trust documents which, on their face, are doubtful authenticity. The signature of SAICI's president is admittedly illegible, the letters purportedly mailed to SAICI from the Bosurgis contain no individual addressee or any address, and none of the documents give any accounting of the amount of the purported trust. An examination of the original documents would shed light on their genuineness.

18. Based upon the documents annexed to the United States' motion for summary judgment, it seems clear that the Bosurgis and SAICI are the majority shareholders in Sanderson & Sons of Italy. This financial relationship would give the Bosurgis the appropriate vehicle to perpetrate collusion.

19. After SAICI's motion for summary judgment was denied, SAICI appealed to the Appellate Division. Mr. Ginsberg also appealed the denial of his motion for an allowance of a fee. Neither SAICI nor Mr. Ginsberg served the record on appeal or their briefs on the United States, nor did either inform the United States of the scheduled oral argument. It is the result of that appellate proceeding, from which the United States was kept uninformed, which SAICI and Mr. Ginsberg seek to use to bind the United States.

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WHEREFORE, because there is some showing of possible collusion against the interests of the United States, the United States respectfully states that a genuine issue of triable fact exists in respect thereto.

DAVID P. LAND
Assistant United States Attorney

Sworn to before me this

23 day of April, 1974

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0304600
Qualified in Kings County
Certified in New York County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

AFFIDAVIT

71 Civ. 928 (KTD)

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

BENEDICT GINSBERG, being duly sworn, deposes and says:

This affidavit is being submitted in response to the affidavit of David P. Land, sworn to April 23, 1974. Apparently unable to overcome the significance of determinations of the State Court, and of the Appellate Division thereof, Mr. Land speculates endlessly, in multi-page paragraphs, on what he might have been able to argue, if only he had the facts to support his imaginative hypotheses.

Every statement in Mr. Land's affidavit is not only inaccurate, but is based upon a hypothesis which has no foundation in fact or in logic.

We cite six of Mr. Land's many statements, as an indication:

1. Mr. Land alleges that I am a federally appointed custodian of the moneys in my possession. The statement is made in various places in his affidavit, particularly paragraph 9 and again paragraph 10.

The State Court action was settled by a stipulation which required Chemical Bank to turn over to me the amount of the settlement, to wit, $215,000, to be held in escrow pending determination of claims "asserted by the Internal Revenue Service..." against the Bosurgis. When the Bank failed to comply, and the United States of America thereafter asserted a claim against the fund, in this Court, Judge Bonsal directed the Bank to comply with the terms of the stipulation, and to turn over the money to me, subject to such further order "...which may be made with regard to the rights of the United States of America, or any other claimant, to the said $215,000" (emphasis supplied). On the Bank's appeal to the Appellate Division Judge Bonsal's order was unanimously affirmed. Neither his order nor the affirmance, made me a custodian.

2. Mr. Land alleges "Mr. Ginsberg had no authority to subject that fund to the State Court's jurisdiction..." (page 4). This is just plain silly. I could not prevent any claimant to the $215,000 from suing me.

3. Mr. Land alleges "Although the Bosurgis were

unwilling to appear in the federal action, they were more than willing to appear in the State Court action when they were sued by SAICI. Mr. Ginsberg, who refused to represent the Bosurgis in this action, voluntarily accepted on behalf of the Bosurgis, SAICI's State Court complaint" (page 5).

The Bosurgis were unwilling to appear in this action. As non-residents they had an absolute right to take that position. The State Court action was completely different because there was a "res", to wit, the $215,000 in my possession, against which process could issue. Since the res could not be distributed, any claimant could begin an action against the Bosurgis by procuring a bond and attaching the res. The cost of the bond was an unnecessary expense, and since the State Court has decreed that the $215,000 (less my fee) is SAICI's property, the Bosurgis were merely acting in their own best interests by avoiding the unnecessary expense of the bond, etc., which is ultimately a charge against them.

4. Mr. Land alleges "The Bosurgis informed SAICI of the pending federal suit, and the Bosurgis' answer to SAICI's complaint suggests impropriety."/ (page 6). The Bosurgis' answer is entirely upon information and belief. I verified it, since my clients were nonresidents. I had no information concerning SAICI, and had no basis for interposing an answer, other than upon information and belief, the information and belief being based on the fact that until that time I had

never heard of SAICI, and had no reason to state that the allegations of the complaint were correct.

5. Mr. Land alleges "The Bosurgis, of necessity, gave Mr. Ginsberg sufficient information to enable him to answer the complaint in a manner which he thought was truthful". (page 6). I answered the complaint on July 14, 1971, substantially on information and belief, on the basis stated in the foregoing paragraph. I did not confer with the Bosurgis until we met in Eruope on August 12, 1971. Mr. Land's assertion that the answer was not truthful, is unwarranted. I regard this issue as fully covered in my affidavit of April 12, 1974, to which Mr. Land has not responded, apparently preferring insult and invective, in lieu of response.

6. Mr. Land alleges "It would be incredible for the Bosurgis to hire Mr. Ginsberg and pay him a fee solely for the purpose of truly divesting themselves of $215,000 by reason of SAICI's suit" (page 5-6). I have not received any fee from the Bosurgis for serving an answer in the SAICI action. When I subsequently ascertained the information set forth in my letter, I did not consider that a fee was in order, and I expect none.

Sworn to before me this
24th day of April, 1974.

Benedict Ginsberg
BENEDICT GINSBERG

ROSE MAMLOUK
Notary Public, State of New York
No. 31-4503129
Qualified in New York County
Commission Expires March 30, 1976

BENEDICT GINSBERG
COUNSELLOR AT LAW
475 FIFTH AVENUE
NEW YORK, N.Y. 10017

MURRAY HILL 3-7079

PAUL TEICHMAN
CHARLES E. RAMOS
M. J. MORRIS

A 355

55

June 10, 1971

Hon. William Kapelman
Supreme Court of the State of
New York
851 Grand Concourse
Bronx, New York 10451

Honorable Sir:

Your Honor may recall effecting an agreement, in Bosurgi v. Chemical Bank, pursuant to which the defendant was to pay $215,000 to me, upon stated conditions, and your Honor was designated as arbitrator, to determine such issues between the parties as might remain for resolution.

After the agreement was reached, and dictated on the record (a copy is enclosed) and after I had delivered a general release from both of the plaintiffs to the defendant, and to those of its employees to whom releases had been requested, it became necessary for me to apply to your Honor to direct the defendant to pay the amount of the settlement.

When we appeared before your Honor, you suggested that, in any event, I should promptly receive that portion of the settlement which represented my fee. Discussions ensued between counsel, and we thereafter returned to your Chambers, at which point counsel for Chemical Bank stated that they had been informed that the Internal Revenue Service proposed to intervene.

The Internal Revenue Service did in fact institute a proceeding in the United States District Court, which resulted in an order, a copy of which I also enclose, which directed the defendant to pay the $215,000 to me, with eventual disbursement to be made only with the approval of the Court.

Chemical Bank took an appeal from that order. It was unanimously affirmed. Chemical Bank thereafter paid the sum of $215,000 to me, in escrow, as provided by the agreement, and by the order of the United States District Court, but my fee is still unpaid.

After the events described above had occurred, an action was instituted in this Court by Sociedad Anonima de Inversiones Comerciales e Industriales (S.A.I.C.I.) against my clients, in which action I was also named as a party defendant. The gravamen of that action is that the moneys which Chemical Bank had originally received from my clients, and which the bank claims were the moneys of my clients' late mother, were at all times trust funds, held by her for the account of S.A.I.C.I. Documents allegedly supporting that contention were attached to and quoted in the summons and complaint served upon me, and the affidavit in support of a warrant of attachment.

I have not yet received authority to appear for my clients in the S.A.I.C.I. case, but I would like to have my fees fixed and paid. It is now almost nine months since the case was settled in your Honor's Chambers.

May I therefore respectfully request that your Honor see counsel, in your capacity as arbitrator, for the purpose of fixing my fee and directing payment, subject to the order of the Federal Court as to the disbursing of the sum which I hold in escrow. Your secretary has indicated that Monday, June 14th at 2 P.M. at your Chambers at 851 Grand Concourse is an appropriate time and place. I am sending a copy of this letter to the attorneys for Chemical Bank, to the Assistant U. S. Attorney in charge of the I.R.S. aspect of the situation, and to the attorneys for S.A.I.C.I., all of whom I assume will regard the arbitration of sufficient importance to them to warrant their attendance.

Respectfully yours,

BENEDICT GINSBERG

bg/sk
Encls.

cc: CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank

U, S. Attorneys Office
Att: MICHAEL I. SALTZMAN, ESQ.

GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
Attorneys for S.A.I.C.I.

Action No. 1: A 358
New York County Clerk's Index No. 22140/71
Action No. 2:
New York County Clerk's Index No. 7939/66

New York Supreme Court

Appellate Division—First Department

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff-Appellant-Respondent,

-against-

LEONE BOSURGI and EMILIO BOSURGI,

Defendants-Respondents,

and

BENEDICT GINSBERG,

Defendant-Respondent-Appellant.

Action No. 1

LEONE BOSURGI and EMILIO BOSURGI,

Plaintiffs,

-against-

CHEMICAL BANK NEW YORK TRUST COMPANY,

Defendant-Respondent.

Action No. 2

RECORD ON APPEAL

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COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff-Appellant-Respondent,

-against-

LEONE BOSURGI and EMILIO BOSURGI, Action No. 1

Defendants-Respondents,

and

BENEDICT GINSBERG,

Defendant-Respondent-Appellant.

LEONE BOSURGI and EMILIO BOSURGI,

Plaintiffs,

-against- Action No. 2

CHEMICAL BANK NEW YORK TRUST COMPANY,

Defendant-Respondent.

STATEMENT PURSUANT TO CPLR 5531

1. The index number in Action No. 1 in the court below is 22140/71; the index number in Action No. 2 in the court below is 7939/1966.

2. The full names of the original parties in each said action are as set forth above and there have been no changes.

Statement Pursuant to CPLR 5531

3. Each action was commenced in Supreme Court, New York County.

4. Action No. 1 was commenced in June, 1971, by service of a summons and verified complaint and issue was joined by service of a verified answer on July 15, 1971; Action No. 2 was commenced in March, 1966 by service of a summons with notice. A complaint was served on May 11, 1966 and issue was joined by the service of an answer on June 29, 1966, a first amended answer on July 19, 1966 and a second amended answer on January 26, 1970. A reply was served February 5, 1970.

5. Action No. 1 is an action to recover the proceeds of a trust in the sum of $215,000. and any increments thereto; Action No. 2 was based upon alleged tortious conduct and was settled by stipulation dated September 15,1970 for the sum of $215,000., which is the fund in suit in Action No. 1.

6. These are cross-appeals from an order entered August 22, 1972 in Action No. 1.

7. The appendix method of appeal is not being used.

Notice Of Appeal Of Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

- -x

NOTICE OF APPEAL

22140/71

S I R S:

PLEASE TAKE NOTICE that the above-named plaintiff appeals to the Appellate Division of the Supreme Court, First Department, from the order of Hon. WILLIAM KAPELMAN, dated August 21, 1972 and entered in the office of the Clerk of the County of New York on August 22, 1972 denying without prejudice plaintiff's motion for an order of consolidation, or concurrent consideration and for summary judgment, and denying the defendant Ginsberg's cross-motion for an order fixing his fee, and this appeal is taken from each and every part of said order, as well as from the whole thereof,

Dated: New York, N.Y.
August 23, 1972

Yours, etc.

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
Office & P.O. Address:
122 East 42nd Street
New York, N.Y. 10017
(212) 697-3440

Notice Of Appeal Of Plaintiff

To:

BENEDICT GINSBERG, ESQ.
Attorney for Defendants
Office & P.O. Address
475 Fifth Avenue
New York, N.Y. 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, N.Y. 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
Office & P.O. Address:
1 Chase Manhattan Plaza
New York, N.Y. 10005

A 365

Notice Of Appeal Of Defendant Ginsberg

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

---------- x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

---------- x

NOTICE OF APPEAL

22140/71

S I R S :

PLEASE TAKE NOTICE that Benedict Ginsberg, one of the above named defendants, appeals to the Appellate Division of the Supreme Court, First Department, from such parts of the order of the Hon. William Kapelman dated August 21, 1972, and entered in the office of the Clerk of the County of New York, on August 22, 1972, which deny without prejudice the motion for an order for consolidation or concurrent consideration and the motion of the said defendant Benedict Ginsberg for an order fixing his fee.

Dated: New York, N. Y.,
August 23, 1972.

Yours, etc.,

BENEDICT GINSBERG
Attorney for Defendants
475 Fifth Avenue
New York, N. Y. 10017
MU 3-7079

Notice Of Appeal Of Defendant Ginsberg

TO: GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
122 East 42nd Street
New York, N. Y. 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, N. Y. 10007

CRAVATH, SWAINE & MOORE
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, N. Y. 10005

On January 10, 1959 Adriana Bosurgi, with

Order Appealed From

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 21 day of August, 1972.

P R E S E N T:

HON. WILLIAM KAPELMAN,

Justice.

----------x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

Index No. 22140/71

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

----------x

Plaintiff having moved this Court for an order consolidating this action with an action in this Court entitled Leone Bosurgi and Emilio Bosurgi, Plaintiffs, against Chemical Bank New York Trust Company, Defendant, Index No. 7939/66, or directing that concurrent consideration be given to the issue herein raised with respect to title of the fund here involved with matters now pending before Mr. Justice Kapelman in the foregoing action and for summary judgment in favor of plaintiff and against defendants pursuant to Rule 3212 of the Civil Practice Law and Rules, and defendant

Order Appealed From

Benedict Ginsberg, Esq., having cross-moved for an order fixing his fee and authorizing him to retain out of the monies now held by him in escrow the sum of $78,800.19 plus 40% of the interest and increment accruing on the said funds and the said motion and cross-motion having regularly come on to be heard

NOW upon reading and filing the notice of motion for consolidation or concurrent consideration and for summary judgment in favor of plaintiff and against defendants dated October 12, 1971, the affidavit of Samuel Gottlieb, Esq., sworn to October 12, 1971 together with the exhibits annexed thereto in support thereof, all with proof of due service thereof, the notice of cross-motion of defendant Benedict Ginsberg, Esq., dated October 20, 1971 for an order fixing his fee and authorizing him to retain out of monies now held by him in escrow the sum of $78,800.19 plus 40% of the interest and increment accruing on the said funds, the affidavit of Bendict Ginsberg, Esq., sworn to October 20, 1971, together with the exhibits annexed thereto, in support of the cross-motion and in opposition to the motion for summary judgment only to the extent that said motion requests an order directing him to turn over the monies held in escrow by him, all with proof of due service thereof, the affidavit of John Lucido, Esq., sworn to October 29, 1971 in opposition to only so much of the motion as requests an order of consolidation and in opposition to the cross-motion, with proof of due service thereof, and the matter having been submitted and upon filing

Order Appealed From

the opinion of the Court, it is

ORDERED that plaintiff's motion for an order of consolidation or concurrent consideration and for summary judgment in favor of plaintiff and against defendants, be and the same hereby is denied without prejudice, and it is further

ORDERED that the cross-motion of defendant Benedict Ginsberg, Esq., for an order fixing his fee and authorizing him to retain out of the monies held by him in escrow the sum of $78,800.19 plus 40% of the interest and increment accruing on said funds, be and the same hereby is denied without prejudice.

ENTER

J.S.C.

FILED
AUG 23 1972
NEW YORK
CO. CLERK'S OFFICE

Opinion Below

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

Index No. 22140/71

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

KAPELMAN, J.:

This is a motion by plaintiff Sociedad to consolidate with another related action or to give it concurrent consideration with respect to title of a fund in the principal amount of $215,000 and to direct summary judgment to Sociedad for said amount and increments thereon, less a sum awarded as counsel fees to Benedict Ginsberg.

The present action by Sociedad is against defendants Leone Bosurgi, Emilio Bosurgi and Benedict Ginsberg. It seeks a declaration that a $215,000 escrow fund held by defendant Ginsberg as a result of the settlement of a lawsuit commenced by the defendants Bosurgi against the Chemical Bank of New York (Bank), is the property of Sociedad, less attorneys fees which are a lien thereon.

The related action is by the Bosurgis represented by Mr. Ginsberg against the Bank, instituted in 1966 alleging fraud and negligence with the assets of a certain account in the name of "Adriana Bosurgi and/or Leone Bosurgi". The action was settled by stipulation on record in court on September 15, 1970, by which the Bank paid the sum of $215,000 which was to be used to purchase certificates of deposit or banker's acceptances which will be held

in escrow by plaintiffs' attorney, Benedict Ginsberg, pending determination of claims asserted by the Internal Revenue Service against the Bank arising out of the Bank's relationship as custodian of the funds of the Bosurgi Brothers or their late mother, Adriana Bosurgi. The stipulation contemplated that the parties would agree upon a formal written stipulation covering additional matters but they have been unable to so agree.

In the Sociedad action wherein issue was joined on July 15, 1971, Sociedad maintains that the fund is its property pursuant to a trust agreement and submits documentary evidence in support of its claim. The Bosurgis and Ginsberg do not oppose plaintiff's complaint except that Ginsberg contends that the fund was created as the result of his legal efforts on behalf of the Bosurgis in the earlier action against the Bank and is subject to an attorney's lien pursuant to written retainer with the Bosurgis. He cross-moves for payment thereof.

The Bank opposes the Sociedad motion and cross motion. It opposes consolidation but takes no position on the merit of Sociedad's summary judgment motion but that it should be denied without prejudice. It points out that the United States Government had not appeared in Sociedad's action, and it is an adverse claimant to the fund. That the Federal Court has issued a restraining order against said fund and the attorney's fee is tied to the question of title to said fund and the validity of the government liens.

The Bank is a defendant in the Federal action faced with liability on the United States Government tax claim as custodian of the fund. It has claimed over against the Bosurgi brothers. However it states that if the United States intervenes in this action, and Sociedad is found entitled to the fund, and

the United States claims are found without merit, then the Bank would be neut[illegible] as to Ginsberg's application for his attorney's fee.

The United States Government on March 2, 1971, commenced an action in the United States District Court, Southern District of New York, to foreclose its tax liens against the sum of $215,000 and sought a temporary injunction. An order was entered in that court on March 18, 1971, requiring that Mr. Ginsberg, attorney for Bosurgi Brothers, shall hold the $215,000 in certificates of deposit "in escrow subject to and impressed with any and all liens of the United States of America and subject to any further order of this Court which may be made with regard to the rights of the United States of America and any other claimant to the said $215,000." The defendants in that action are the Bosurgi Brothers, individually and as executors of the Estate of Adriana Bosurgi, the Chemical Bank and Benedict Ginsberg on the bank's cross complaint.

The Government has indicated by letter dated October 28, 1971, that it intends to amend the complaint to add Sociedad and Mr. Ginsberg as defendants in the federal action, and bring them into said action.

It appears evident that this motion is to force the expeditious disposition of the determination of conflicting interests.

The Government alleges without evidentiary proof that the Bosurgi Brothers control Sociedad. The Government maintains that the most expeditious manner of disposing of the issues is to litigate the title to the fund in the Federal Court.

Ginsberg maintains that the State Supreme Court, where the earlier action was litigated, is the only court that has the power to fix his attorney fees.

Opinion Below A 373

Sociedad argues that the question of title to the fund could only be decided in the State court and cites Vernitron Corp. et al. v. Benjamin, 440 F. 2d 105 (2nd, CCA).

In the court's view Vernitron, supra, is not dispositive herein. The Federal court action was instituted prior in time to Sociedad's action. In Vernitron the parties were the same in both courts. The Government is not a party in the State action and the judgment in the State court would not affect the action in the Federal court. Furthermore, the existing restraining order of the Federal court prevents disposition of the fund.

As to the attorney's liens, Internal Revenue Code 7323(b)(8) protects such lien in reasonable amount.

There are procedural stumbling blocks which affect proper disposition of the matter. The motion for summary judgment and cross motion are not ripe for determination of rights respecting the fund. The motion and cross motion are denied without prejudice.

Dated: January 24, 1972.

J. S. C.

FILED
JAN 24, 1972

NEW YORK
CO. CLERK'S OFFICE

Notice Of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

No. d. C.

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

- against -

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

NOTICE OF MOTION

Index No. 22140/71

PLEASE TAKE NOTICE, that upon the annexed affidavit of Samuel Gottlieb, Esq. sworn to the 12th day of October, 1971 and the exhibits annexed thereto and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Special Term Part I, located at the Courthouse, 60 Centre Street, in the Borough of Manhattan, City and State of New York, on the 4th day of NOVEMBER, 1971 or as soon thereafter as counsel can be heard, that an order be made and entered herein consolidating the above-entitled action with the action in this Court entitled Leone Bosurgi and Emilio Bosurgi, Plaintiffs, against Chemical Bank New York Trust Company, Defendant, Index No. 7939/66, or directing that concurrent consideration be given as to the issue herein raised with respect to title of the fund here involved with matters now pending before Mr. Justice KAPELMAN in the foregoing

Notice Of Motion

action pertaining to and involving said fund and the claim of Benedict Ginsberg, Esq. for an award of counsel fees to be paid out of said fund and directing that summary judgment be granted in favor of plaintiff above named against the defendants above named pursuant to Rule 3212 of the Civil Practice Law and Rules, upon the ground that there are no triable issues of fact and that there are no defenses to plaintiff's cause of action and that plaintiff is entitled to summary judgment as a matter of law, together with costs and disbursements, and for such other and further relief in the premises as may be proper.

PLEASE TAKE FURTHER NOTICE, that answering affidavits, if any, shall be served upon the undersigned at least five (5) days before the return date of this motion.

Dated, New York, New York
October 12, 1971

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
Office and Post Office Address:
122 East 42nd Street
New York, New York 10017
Tel.: 697 -3440

TO:

BENEDICT GINSBERG, ESQ.
Attorney for Defendants
475 Fifth Avenue
New York, New York 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, New York 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, New York 10005

Affidavit Of Samuel Gottlieb In Support

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

- x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

- against -

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SAMUEL GOTTLIEB, being duly sworn, deposes and says:

I am a member of the firm of Gainsburg, Gottlieb, Levitan & Cole, attorneys for plaintiff Sociedad Anonima de Inversiones Comerciales e Industriales (S.A.I.C.I.) and submit this affidavit in support of plaintiff's motion for summary judgment based on the annexed undisputed documentary evidence. Preliminarily, it should be noted, as will be hereinafter demonstrated, that the documents which support plaintiff's complaint have all been conceded by defendants to be genuine and authentic.

This is an action for a declaration that a $215,000 escrow fund held by defendant Benedict Ginsberg, Esq., as a result of the settlement of a lawsuit commenced by Leone Bosurgi and Emilio Bosurgi against the Chemical Bank

Affidavit Of Samuel Gottlieb In Support

of New York in the Supreme Court, New York County, Index No. 7939/66, represent the proceeds of:

> " * * * funds which had been held by the parties to said lawsuit in 'fiduciary administration' for and on behalf of plaintiff;"

and that

> "the amounts paid in settlement of said claim is the property of and accountable to plaintiff;" (Pltf's Complaint p.5)

and directing that said escrowee pay said escrow fund and any increments thereof to plaintiff.

Plaintiff's verified complaint (Exh. 1, annexed hereto) alleges that an Italian company, W. Sanderson & Sons of Milan (Sanderson) determined to establish a plant to produce and sell citrus by-products in Argentina and entered into a Joint Venture with plaintiff whereby plaintiff agreed to and did provide large sums of money for the erection and operation of a plant in Concordia, Argentina. It is further alleged that Sanderson agreed to repay plaintiff by the deposit of funds in New York for and on behalf of plaintiff and that on December 10, 1954 an agreement, attached to plaintiff's complaint as Exhibits 1 and 1-A, was entered into between plaintiff and Adriana Bosurgi and Leone Bosurgi and Emilio Bosurgi, which provided in part:

Affidavit Of Samuel Gottlieb In Support

> "According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested." (Pltf.'s Complaint p.3)

It is further alleged and established by compelling documentary proof that Chemical Bank of New York was thereafter designated as the depository for plaintiff's funds pursuant to the aforesaid trust agreement in an account in the names of "Adriana Bosurgi and/or Leone Bosurgi and Emilio Bosurgi" and that in 1966 Leone Bosurgi and Emilio Bosurgi instituted an action in the Supreme Court New York County, Index No. 7939/66, against the Chemical Bank, claiming fraud and negligence with the assets of said account, which action was settled by stipulation by which Chemical Bank paid the sum of $215,000 to:

> " * * * Benedict Ginsberg, attorney for [Leone Bosurgi and Emilio Bosurgi], and held him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the [Chemical Bank] arising out of their relationship as banker, depository or custodian of the funds of [Leone Bosurgi and Emilio Bosurgi] or their late mother, Adrianna Bosurgi." (Pltf's Complaint p.4)

The verified complaint alleges with respect to said fund that:

> "16. Said sum of $215,000 is now in the possession of Benedict Ginsberg, Esq., as escrowee.
>
> 17. The said $215,000 plus any increment thereto held in escrow by Benedict Ginsberg, Esq. as aforesaid constitutes the property of plaintiff by virtue of the aforesaid trust agreement.
>
> 18. Defendants Leone Bosurgi and Emilio Bosurgi have no interest in said fund other than as former trustees thereof for and on behalf of plaintiff.
>
> 19. Benedict Ginsberg, Esq., as escrowee refused and still refuses to turn over said fund to plaintiff without a Court order directing such turnover." (p.5)

Issue was joined by the service of an answer on July 15, 1971, denying the material allegations of the complaint, a copy of which is annexed hereto as Exhibit 2.

That the said escrow fund held by Benedict Ginsberg, Esq. represents the proceeds of a trust long ago established in writing between plaintiff and defendants Leone Bosurgi and Emilio Bosurgi and their late mother Adriana Bosurgi, as alleged, cannot be disputed as the annexed documentary evidence establishes.

Attached hereto as Exhibit 3 is a copy of the letter agreement of December 10, 1954, in original Italian with English translation appended thereto, formulating the trust upon which this action is predicated and detailing the underlying relationship giving rise thereto, wherein it was provided in pertinent part that:

"S.A.I.C.I., a holding company of Montevideo, acting on behalf of people who want to keep their name secret for commercial, competitive reasons, hereby stipulates and agrees with Mrs. Adriana Bosurgi jointly and severally with her sons, Leo and Emilio, what follows. The financing group, through S.A.I.C.I., has granted the financing for the completion of a plant for the production of citrus by-products in Concord (Argentina), on the W. Sanderson & Sons patent, with the authorization to use the trade name Sanderson for the purposes of marketing its products. This financing is guaranteed by the S.A.I.C.I. right to participate in the 40% of the shares of the Company W. Sanderson and Sons, with office in Milan and plant at Messina; to the same effect it will participate at par in the increase of capital of said W. Sanderson & Sons Company of Milan.

According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciery administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested."
(emphasis added)

The trust agreement was thereafter affirmed from time to time between plaintiff and the Bosurgis. On January 26, 1955, Adriana Bosurgi and her sons Leone Bosurgi and Emilio Bosurgi wrote to plaintiff, stating in part:

"Mr. President:

* * *

We consider the agreement fully effective and valid in every respect according to the draft of December 10, inst., also before receipt of the final draft."

Affidavit Of Samuel Gottlieb In Support

On January 10, 1959 Adriana Bosurgi, with confirmation by Leone Bosurgi and Emilio Bosurgi, wrote to plaintiff:

"Gentlemen:

We hereby advise you that the accounts with your shareholders were settled up to and including December 31, 1958, and therefore the cash or securities amount, in conformity with the list submitted to the same and marked with their initials, have allowed for the closing of the balance relative to the Sanderson Argentina and W. Sanderson & Sons, Milano-Messina (Italia), administrations.

It is hereby confirmed that the undersigned remains the trustee and will administer in her own name, but on your behalf, the assets existing in New York relative to the final balance, as it was agreed upon.

This to reassure and inform you. Awaiting your kind confirmation, we remain

Very truly yours"

Again, on January 25, 1961, Adriana Bosurgi and Leone Bosurgi and Emilio Bosurgi wrote to plaintiff, stating:

"Gentlemen:

We advise you hereby that accounts were settled up to and including December 31, 1960, and after settling the debit and credit balance, we determined the amount which remains at your disposal according to the reckonings we agreed upon, and which should be retained reservedly by both parties.

It is understood, in confirmation of the previous agreements, that the balance of your accounts shall be administered by the writer as the trustee, and eventually by the undersigned in her absence, and that the securities fiduciary deposit existing with the Chemical Bank of New York, remains under the name of Adriana Bosurgi, who shall be answerable to your company for the same, according to previous agreements thereof."
(emphasis added)

The agreement was further affirmed by letters dated July 12, 1962, August 1, 1962 and December 20, 1962, respectively. Copies of all of said letters, in original Italian with English translation appended thereto, are annexed as Exhibits 4, 5, 6, 7, 8 and 9, respectively. In order to avoid "needless expenditure of time and an unnecessary expense to undertake the depositions" of defendants or to seek the issuance of "a Commission or Letters Rogatory," all of these foregoing exhibits were submitted by deponent to defendants' counsel under cover of letter dated August 5, 1971, "to confirm the authenticity and genuineness of the documents and signatures of your clients, of which we have submitted these photostats, and the exactness of the photostats themselves and their translations." Defendant Benedict Ginsburg, Esq. thereupon, by letter dated September 14, 1971, acknowledged the genuineness and authenticity of the exhibits, stating:

"Dear Sir:

I returned for Europe last week, where I conferred with Mr. Leone Bosurgi and his personal attorney concerning the genuineness and authenticity of the documents which you forwarded to me with your letter of August 5. As a result of that conference, I am authorized to inform you that ... 'they are true copies of the originals and they were duly executed by the persons whose signatures appear thereon, and the English translations thereof are true and accurate'." (Emphasis added)

A copy of plaintiff's letter requesting such acknowledgment and defendants' admission are annexed hereto as Exhibits 10 and 11, respectively.

In 1966, Leone Bosurgi and Emilio Bosurgi brought an action in the Supreme Court New York County, Index No. 7936/66, against the Chemical Bank for fraud, mismanagement and negligence in respect of the assets of the account registered in the Bosurgi name, and as documented herein, in fact held in trust for plaintiff. A copy of the complaint in said action is annexed hereto as Exhibit 12.

This action was settled by stipulation dated September 15, 1970, in the sum of $215,000., and the said settlement proceeds apparently represent the sole remaining assets of the trust account. A copy of said stipulation is annexed hereto as Exhibit 13. Pursuant to said stipulation, Chemical Bank agreed to pay the sum of $215 000:

> " * * * to Benedict Ginsberg, attorney for [Leone Bosurgi and Emilio Bosurgi], and held him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the [Chemical Bank] arising out of their relationship as banker, depository or custodian of the funds of [Leone Bosurgi and Emilio Bosurgi] or their late mother, Adrianna Bosurgi."

In March, 1971, the United States of America, as plaintiff, instituted an action in the United States District Court for the Southern District of New York against

Leone Bosurgi and Emilio Bosurgi, as Executors of the Estate of Adriana Bosurgi, Deceased, and Chemical Bank, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; and Leone Bosurgi and Emilio Bosurgi as Defendants (71 Civ. 928), which in essence sought the enforcement of a claimed lien for unpaid estate taxes, presumably arising against the Estate of Adriana Bosurgi. The documented record here reflects that the decedent, Adriana Bosurgi, and her sons, defendants Leone Bosurgi and Emilio Bosurgi, acted as custodian of plaintiff's funds and thus no right can exist for a claimed creditor of the decedent to interfere with plaintiff's documented right to its property. In the federal suit, to which plaintiff was not a party, the Government obtained an order for said defendants to show cause:

> " * * * why a preliminary injunction should not be issued restraining the defendant Chemical New York Bank from paying over to the defendants Leone Bosurgi and Emilio Bosurgi the sum of $215,000, and directing the defendant Chemical New York Bank to deposit the aforementioned fund of $215,000 in an interest bearing account pending a final determination of this action; * * * "

A copy of the temporary restraining order and order to show cause made March 2, 1971 by the United States District Judge MARVIN FRANKEL is annexed hereto as Exhibit 14. The said motion was argued before United States District Judge

DUDLEY B. BONSAL, who denied the Government's motion for a preliminary injunction and ordered the Chemical Bank to pay over to Benedict Ginsberg, Esq., as escrowee, the said $215,000; and

> "(2) That the said Benedict Ginsberg, Esq. purchase with the said $215,000 certificates of deposit of the Chase Manhattan Bank; and further
>
> (3) That the said Benedict Ginsberg, Esq. have and hold said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000."

Said fund, in the form so required, is now in the hands of the escrowee, Benedict Ginsberg, in accordance with Judge BONSAL's order, a copy of which is annexed as Exhibit 15.

The Government has been formally advised that as the documentary record establishes, the Chemical Bank account was not and is not the property of the Bosurgis but belongs to plaintiff. Copies of the pleadings herein were served on the United States Attorney for the Southern District of New York and the law firm of Cravath, Swaine & Moore, Esqs., attorneys for the Chemical Bank.

Affidavit Of Samuel Gottlieb In Support

The reason for requesting consolidation with the action brought by the Bosurgis, as plaintiffs, in this Court against the Chemical Bank referred to in the foregoing notice and for requesting that this application be heard in connection with the matters concerning the fund here involved, remaining to be determined by Mr. Justice KAPELMAN in said action, are outlined by me in specific detail in my letter to Benedict Ginsberg, Esq. dated June 24, 1971, which, for the Court's convenience, is quoted in full:

'Benedict Ginsberg, Esq.
475 Fifth Avenue,
New York, New York

Re: Action 1 Bosurgi, et al v. Chemical Bank New York Trust Company

Action 2 Sociedad Anonima de Inversiones Comerciales e Industriales v. Leone Bosurgi, Emilio Bosurgi and Benedict Ginsberg

Dear Mr. Ginsberg:

As requested at the conference held yesterday afternoon before Mr. Justice Kapelman this letter is being sent to all counsel and to the Court stating the position of our client, S.A.I.C.I.

On June 2, 1971 I wrote you:

'Herewith submitted is a copy of our summons and complaint and proposed order of attachment in the above matter. Despite the fact, as my affidavit points out, the fund involved in our lawsuit, and which it is proposed to attach, is in escrow in the form required from The Chase Bank and that there may be no withdrawal of any monies except by specific Court sanction, we are advised that an undertaking in the sum of at least $10,000 will be required to be filed to cover Sheriff's poundage, etc.

> I am certain, on further reflection, that your conclusion, as was mine, that in the present context no beneficial purpose can be served by commencing the action through attachment with the concomitant needless and impractical expense involved in the cost of the undertaking and Sheriff's poundage fees where the Sheriff, in view of the aforesaid Court order, can not do more than simply serve the order of attachment. Authority on your part to accept service of the summons and complaint and a simple stipulation between us governing the disposition of the funds in escrow along similar lines to the foregoing order, can effectively serve everyone's purpose and yet at the same time avoid needless expense and proceedings; especially since the documentary showing in support of our order, as we have been advised, is sufficient to have the attachment issue upon the mere filing of the undertaking.'

My letter concluded by asking that you give the matter your immediate attention and that if service is accepted and there is an appearance 'we will decide promptly how and in what manner the taxing authorities should be vouched in or what proceedings should be initiated so that all conflicting claims in respect of the escrow fund be resolved' and that 'would necessarily include the Chemical Bank.' Suffice it to say, after acknowledging my letter, you did obtain the necessary authorization, served a notice of appearance and obtained an extension of time to answer.

Subsequently on June 16, 1971 Michael I. Saltzman, Esq., Assistant United States Attorney, in a telephone talk with me asked that I send him a copy of the summons and complaint, our proposed order of attachment and the affidavits and exhibits annexed thereto in the aforementioned law suit instituted by this office. At yesterday's conference, I stated that copies of those papers would likewise be furnished to counsel for the Chemical Bank which will be done together with a copy of this communication.

It is our position:

1. That the law suit we have begun and in which there is presented substantial documentary proof in support of the issue raised by plaintiff, claiming title to the funds here involved, should be consolidated or in any event heard and considered concurrently with the proceedings now pending before Mr. Justice Kapelman in the first of the above entitled actions.

2. Unless the issue raised as to the title of these funds is initially and promptly determined we contend there will exist no valid or legal basis for Mr. Justice Kapelman to make a complete and final determination of this matter.

3. Our request for a consent to consolidation or, in the alternative, for a concurrent consideration of the issue raised as to title with the pending proceedings is primarily designed to enable the most expeditious disposition of the determination of the conflicting rights and interests.

4. As stated by me before Mr. Justice Kapelman, we recognize that you are entitled to compensation for the services rendered against the Chemical Bank and in the related proceedings resulting in the escrow fund (represented by the certificates of deposit) now being in your possession. I repeat here what was stated in that regard by me at the foregoing conference that in fairness our client must recognize that upon succeeding in proving title to the escrow funds your services will, of course, have been to our client's decided benefit. You claim that your legal fee is predicated upon a written retainer with your client which you advised Mr. Justice Kapelman at the conference, entitled you to $17,000. plus 40% of the amount recovered by way of settlement. In response to the Court's statement that a retainer agreement is subject to judicial review and evaluation, your position was that that may be done at the client's instance and that here there was no objection by your client. However, your written retainer arrangement made with your client, the Bosu[illegible]s, is not binding upon our client. I, of course, recognize that we have no standing before Mr. Justice Kapelman in those proceedings unless our client's claim of title is first established. It was for that very reason that consolidation or concurrent hearing was and is proposed by me to expedite matters.

5. You repeated your contention, before Mr. Justice Kapelman that you had advanced, in opposing the attempt of the Chemical Bank to interpose a cross or counter claim against your client, the Bosurgis, that the determination of your pending litigation by settlement was a bar notwithstanding the pendency of the proceedings involving your fee allowance. Although I may not concur in that view, it is needless, at this stage, for me to challenge it because viewed from every standpoint, our client's claim of title, as above noted, necessarily must be considered and disposed of by Mr. Justice Kapelman in connection with your claim of counsel fees under the aforesaid retainer. I repeat, if consolidation or concurrent hearing are not consented to, the application in our client's behalf will simply take the form that our client be authorized to appear in your proceeding on the legal fee issue, as claimant to ownership of these escrow funds so that such issue can be quickly, fully, effectively and finally determined. Since the Chemical Bank and government counsel have been alerted to the foregoing, I assume that Mr. Justice Kapelman will require, in the absence or failure of the consent requested, that notice of our application be given to the bank and government counsel so that they may take such steps in respect thereof as may be deemed appropriate.

6. As I advised you in the foregoing conference, it is our position that the stipulation placed upon the record in your law suit on September 15, 1970 by you and the Cravath firm, to the effect that any dispute, difference of opinion or issue pertaining to the settlement thereby made (which includes the issue as to legal fees) is to be determined by Mr. Justice Kapelman 'as an arbitrator' is invalid and erroneous in so providing. In fairness, it must be added, that Mr. Justice Kapelman, at our conference, was quick to recognize the inappropriateness of the use of the term 'arbitrator' and appropriately observed that in this instance it was a matter of semantics. No one expressed any dissent in that regard. Accordingly, I repeat, on behalf of the client we represent, that correction be made as to the term 'arbitrator' so that Mr. Justice Kapelman may dispose of these issues, as was clearly intended, in quick and summary fashion either by conventional hearing or under Simplified Procedure. It is unnecessary, therefore, in this connection to do no more than cite the cases indicating that a Supreme

Court Judge may not serve as 'arbitrator' even upon the consent of counsel and the clients (Matter of Bernarr Macfadden v. Felix C. Benvenga, 290 N Y 568, Matter of Jacobs v. Steinbrink, 242 App Div 197, 1466 Realty Co. v. Baum, 38 Misc 2d 209).

7. Finally, it must be emphasized here, as I did at the conference, that the course suggested in no respect is in conflict or contravenes the order of Judge Bonsal. I again direct attention to Vernitron Corp. et al v. Benjamin, 440 F. 2d 105 (2 Cir. Mar. 5, 1971). That authority renders it clear beyond dispute that the question of title to these funds raised by our client can only be decided in the proceeding pending in our state courts. Manifestly, Judge Bonsal cannot undertake to decide your claim as to legal fees and your rights asserted on the basis of your retainer with the Bosurgis which my client, as I asserted at the conference and repeat here, has the right to challenge as the owner of the funds held by you in escrow. Of course, if the issue as to title is resolved in our client's favor it will dispose of the tax claim asserted by the government against the Bosurgis. However, that, under the decision in Vernitron Corp., does not furnish any basis for interposition or restraint as to these state court proceedings because, as the federal court of appeals held:

> '[i]t is not sufficient to show that the matter properly before a state court embraces issues within the compass of the federal suit, even if the federal court has exclusive jurisdiction over its case.' (p. 108)

Moreover, '[t]here is no reason why the state court cannot or should not determine issues of fact and state law relevant thereto as they come up in the state litigation', and of controlling importance is the further ruling of the court of appeals that '[t]he subsequent effect of collateral estoppel, far from requiring the federal court to stay proceedings in the state court, is a result which should be welcomed to avoid the task of reconsidering issues which have already been settled by another competent tribunal' (p. 108).

That Mr. Justice Kapelman necessarily should and as I urged, must determine the issue of title to these funds in the pending proceedings, under the foregoing authority is unavoidable. As I advised the Court at the foregoing conference and government counsel that upon success in establishing title in our client, our right as a claimant under Judge Bonsal's order would perforce be incontestably established under the authority of Vernitron Corp., supra.

On the basis of the foregoing, I urge that this office be immediately advised as to whether the requested consent for consolidation or for a concurrent hearing on the issue of title in the pending proceedings will be forthcoming. If not, I propose to move for appropriate relief to that end as heretofore indicated.

Very truly yours,

Samuel Gottlieb

cc Hon. William Kapelman

Michael I. Saltzman, Esq.
Assistant United States Attorney

Cravath, Swaine & Moore, Esqs.
Attention: John A. Lucido, Esq.

Kostelanetz & Ritholz, Esqs.
Attention: Frederick M. Mintz, Esq."

Action No. 1, referred to in the foregoing communication, is the foregoing litigation mentioned in the notice of motion herein; Action No. 2 is, of course, this lawsuit. It is obvious from the foregoing that in order to achieve a complete determination of the matters involving this fund, it is essential that consolidation and contemporaneous hearing with the matters involving this fund and remaining undetermined before Mr. Justice KAPELMAN, be directed. Accordingly, this

notice of motion is being served on all counsel involved and who have appeared in both cases.

WHEREFORE, it is respectfully requested that the relief specified in the foregoing motion be in all respects granted.

SAMUEL GOTTLIEB

Sworn to before me this
12th day of October, 1971

ALAN C. KRIEGER
Notary Public, State of New York
No. 60-2202800
Qualified in Westchester County
Term Expires March 30, 1973

Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

COMPLAINT

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

- x

Plaintiff by GAINSBURG, GOTTLIEB, LEVITAN & COLE, its attorneys, complaining of the defendants respectfully alleges upon information and belief:

1. At all times hereinafter mentioned plaintiff, Sociedad Anonima de Inversiones Comerciales and Industriales (hereinafter referred to as S.A.I.C.I.) was and is a holding company organized and existing under and by virtue of the laws of Uruguay.

2. At all times hereinafter mentioned defendants, LEONE BOSURGI and EMILIO BOSURGI, were and still are citizens and residents of the Republic of Italy.

3. At all times hereinafter mentioned Adriana Bosurgi was the mother of defendants Leone Bosurgi and Emilio Bosurgi and prior to her death on March 27, 1963 a citizen and resident of the Republic of Italy.

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Exhibit 1 - Verified Complaint Annexed To Foregoing Affidavit

4. At all times hereinafter mentioned Benedict Ginsberg was an attorney duly licensed to practice law in the State of New York and maintaining an office therefor at 475 Fifth Avenue, New York, New York.

5. At all times hereinafter mentioned and upon information and belief W. Sanderson & Sons (hereinafter referred to as Sanderson, Italy) was a company organized and existing under and by virtue of the laws of the Republic of Italy with its headquarters in Milan and engaged in the business of producing and selling citrus by-products.

6. Upon information and belief prior to 1954, Sanderson, Italy determined to establish a business and plant in Argentina to produce and sell citrus by-products.

7. Thereafter Sanderson, Italy entered into a joint venture with plaintiff whereby plaintiff agreed to and did provide and advance large sums of money for the erection and operation of a plant in Concordia, Argentina, and upon information and belief established the company under the laws of Argentina known as W. Sanderson & Sons, Argentina (hereinafter referred to as Sanderson, Argentina).

8. Upon information and belief, Sanderson, Italy agreed with plaintiff that the funds advanced by plaintiff

Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

to establish the aforementioned Argentine citrus by-products producing plant would be repaid through the deposit of moneys in a New York bank for and on behalf of plaintiff.

9. Upon information and belief in order to carry out the aforesaid arrangement and on or about December 10, 1954, an agreement was entered into by and between plaintiff and Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi which provided in part:

> "According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested.
>
> "Yearly, or at periods of time to be set by mutual consent, the parties hereto shall determine profits, amortization amounts and interests, and shall establish a balance to be kept freely at Mrs. Bosurgi's disposal, registered in her name or in the name of her sons, in fiduciary administration for S.A.I.C.I."

The original agreement was in Italian and a copy thereof, together with the English translation, is annexed hereto, made a part hereof and marked Exhibits 1 and 1A respectively.

10. The Chemical Bank of New York (now known as Chemical Bank New York Trust Company, hereinafter referred to as Chemical Bank) was thereafter designated as the depositary for plaintiff's funds pursuant to the aforesaid agreement.

Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

11. The account established as aforesaid at the Chemical Bank was maintained in the names of Adriana Bosurgi and/or Leone Bosurgi and Emilio Bosurgi."

12. From time to time thereafter deposits were made in said account at the Chemical Bank to be held in "fiduciary administration" for and on behalf of plaintiff.

13. In or about 1966 defendants Leone Bosurgi and Emilio Bosurgi instituted an action in the Supreme Court, New York County (Index No. 7739/1966) against the Chemical Bank claiming that the aforesaid trust account had been mismanaged by the Bank and said Bank was guilty of fraud and negligence in treating with the assets of said account.

14. On September 15, 1970 the said action was settled by stipulation in open Court, a copy of which is annexed hereto and incorporated herein as Exhibit 2.

15. Pursuant to said stipulation Chemical Bank agreed to and did pay the sum of $215,000:

> ". . . to Benedict Ginsberg, attorney for [Leone Bosurgi and Emilio Bosurgi], and held by him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the [Chemical Bank] arising out of their relationship as banker, depository or custodian of the funds of [Leone Bosurgi and Emilio Bosurgi] or their late mother, Adrianna Bosurgi."

Exhibit 1 - Verified Complaint Annexed
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16. Said sum of $215,000 is now in the possession of Benedict Ginsberg, Esq., as escrowee.

17. The said $215,000 plus any increment thereto held in escrow by Benedict Ginsberg, Esq. as aforesaid constitutes the property of plaintiff by virtue of the aforesaid trust agreement.

18. Defendants Leone Bosurgi and Emilio Bosurgi have no interest in said fund other than as former trustees thereof for and on behalf of plaintiff.

19. Benedict Ginsberg, Esq., as escrowee refused and still refuses to turn over said fund to plaintiff without a Court order directing such turnover.

WHEREFORE, plaintiff demands judgment decreeing that:

1. (a) the funds which were the subject of the law suit commenced by Leone Bosurgi and Emilio Bosurgi against the Chemical Bank in the Supreme Court, New York County (Index No. 7939/1966) were funds which had been held by the parties to said law suit in "fiduciary administration" for and on behalf of plaintiff;

(b) the amounts paid in settlement of said claim is the property of and accountable to plaintiff;

Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

(c) the said $215,000 and any increments thereof held in escrow by Benedict Ginsberg, Esq. constitutes the property of plaintiff and directing that said escrowee pay to plaintiff said escrow fund.

2. For such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
Office & P.O. Address
122 East 42nd Street
New York, New York 10017
Tel. No. OX 7-3440

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Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

Messina, 10 dicembre 1954

SCHEMA DI ACCORDO BOSURGI e S.A.I.C.I. MONTEVIDEO

A seguito delle intese verbali fin qui condotte, restano convenuti i seguenti punti:

La S.A.I.C.I., società holding di Montevideo, che tratta per conto di persone che intendono mantenere il riserbo sul loro nome per motivi commerciali di concorrenza, conviene e concorda coi Signori Adriana Bosurgi in solido coi figli Leo ed Emilio, quanto segue:

La parte finanziatrice, per tramite della S.A.I.C.I. ha concesso finanziamenti per il completamento in Concordia (Argentina) di un opificio per la produzione di derivati agrumari, su patente W.Sanderson & Sons, e con la concessione di poter usufruire del nome commerciale Sanderson per la commercializzazione dei suoi prodotti; tale finanziamento viene garantito dal diritto della S.A.I.C.I. di partecipare col 40 per cento della quota azionaria della Società W.Sanderson & Sons, con sede in Milano e stabilimento in Messina, e a tale proposito parteciperà alla pari all'aumento di capitale della predetta Società W.Sanderson & Sons di Milano;

la restituzione graduale, secondo piano concordato dalle parti, alla finanziatrice avverrà mercè versamento a New York in dollari, a banca di New York che la parte finanziatrice sarà per indicare, o con investimenti fruttiferi secondo intese che saranno prese con la Signora Bosurgi, alla quale viene assegnata la gestione fiduciaria del deposito relativo, che potrà essere tenuto sotto il suo nome, impegnandosi peraltro a renderne conto, quando richiesta.

Annualmente, o a periodi da prestabilirsi verrà effettuato di comune accordo la contabilizzazione dei profitti, dell'importo dell'ammortamento o degli interessi, stabilendo un saldo che sarà tenuto a libera disposizione sotto il nome della Signora Bosurgi o dei Figli, in gestione fiduciaria della S.A.I.C.I.

Il presente accordo viene firmato in data odierna, e le clausole relative vengono concordate con scrittura riservata, che servirà di base per le contabilizzazioni periodiche, o che verrà costituita o eliminata con eventuali successivi accordi, che si prenderanno nel corso dell'esecuzione di questi.

In fede,

S.A.I.C.I. Montevideo
Il Presidente

A. Bosurgi

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Exhibit 1 - Verified Complaint Annexed To Foregoing Affidavit

Messina, December 10, 1954

DRAFT AGREEMENT BETWEEN BOSURGI AND S.A.I.C.I. -MONTEVIDEO

Following the verbal agreements carried out up to the present day, the parties hereto agree on the following points :

S.A.I.C.I., a holding company of Montevideo, acting on behalf of people who want to keep their name secret for commercial, competitive reasons, hereby stipulates and agrees with Mrs. Adriana Bosurgi jointly and severally with her sons, Leo and Emilio, what follows :

The financing group, through S.A.I.C.I., has granted the financing for the completion of a plant for the production of citrus by-products in Concord (Argentina), on the W. Sanderson & Sons patent, with the authorization to use the trade name Sanderson for the purposes of marketing its products. This financing is guaranteed by the S.A.I.C.I. right to participate in the 40% of the shares of the Company W. Sanderson and Sons, with office in Milan and plant at Messina; to the same effect

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Exhibit 1 - Verified Complaint Annexed To Foregoing Affidavit

it will participate at par in the increase of capital of said W. Sanderson & Sons Company of Milan.

According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested.

Yearly, or at periods of time to be set by mutual consent, the parties hereto shall determine profits, amortization amounts and interests, and shall establish a balance to be kept freely at Mrs. Bosurgi's disposal, registered in her name or in the name of her sons, in fiduciary administration for S.A.I.C.I.

The present agreement shall be signed under to-day's date, and the provisions thereto shall

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Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

be stipulated by a simple contract, which will serve as the basis for the periodical accounts; it shallobe eventually substituted or cancelled by subsequent agreements carried out in the course of the performance thereof.

S.A.I.C.I. -MONTEVIDEO

The President

(signature illegible)

A. Bosurgi

In approval :

L. Bosurgi

Emilio Bosurgi

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Exhibit 1 - Verified Complaint annexed
To Foregoing Affidavit

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART XVII.

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LEON BOSURGI and EMILIO BOSURGI, :

Plaintiffs, :

-against- : Index Number 7939/66

CHEMICAL BANK NEW YORK TRUST COMPANY, : STIPULATION

Defendant. :

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New York, N. Y.
September 15, 1970.

Before:

HON. WILLIAM KAPELMAN, Justice.

Appearances:

BENEDICT GINSBERG, ESQ.,
Attorney for Plaintiffs,
475 Fifth Avenue
New York, N. Y.

Messrs. CRAVATH, SWAINE & MOORE,
Attorneys for Defendant,
1 Chase Manhattan Plaza
New York, N. Y.
By: JOHN W. BARNUM, ESQ., of counsel.

- - -

Alfred H. Ehrlich, C.S.R.,
Official Court Reporter.

Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

The action is settled for the sum of $215,000.00, to be paid within ten days from the date hereof, upon the following terms and conditions:

(1) Counterclaims are withdrawn, with prejudice.

(2) Prior to payment, the plaintiffs shall deliver to the defendant general releases running to the defendant and such of its employees or former employees as the defendant desires to be included in the releases, notification of such persons to be made by the attorneys for the defendant to the attorney for the plaintiff within seven days from the date hereof.

(3) The proceeds of the settlement are to be paid to Benedict Ginsberg, attorney for plaintiffs, and held by him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the defendant arising out of their relationship as banker, depository or custodian of the funds of the plaintiffs or their late mother, Adrianna Bosurgi.

(4) Pending the determination of the aforesaid claims, the entire amount of the settlement,

Exhibit 1 - Verified Complaint Annexed To Foregoing Affidavit

together with such interest or increment that may accrue thereon, shall be held in escrow in the form of certificates of deposit or bankers acceptances issued by and purchased or acquired through such bank or trust company in the Borough of Manhattan as the defendant may select, the selection to be made within five days from the date hereof.

This settlement is made without any interest, costs or disbursements to any of the parties, and the costs to which reference is made shall include costs to abide the event as determined in previous appeals.

In the event of any dispute or difference of opinion with respect to the terms hereof or the manner of effecting the same or the obligation of plaintiffs' attorney with respect to the escrow funds, such issue or issues shall be referred to Mr. Justice Kapelman for determination by him as an arbitrator, either upon affidavits or upon testimony, as he may deem appropriate, with the decision which he may render on such issues to be deemed the decision of an arbitrator, it being

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Exhibit 1 - Verified Complaint Annexed To Foregoing Affidavit

understood that this method is being selected so that the determination so made shall be final and non-appealable.

It is intended by the parties that this settlement is now concluded and is in full force and effect. Notwithstanding, the parties shall agree upon a formal written stipulation which shall embody all of the terms as hereinbefore set forth in addition to the material to be supplied by each of the parties.

- - -

THE COURT: Now I turn to the attorney for the plaintiff. You have heard the stipulation, Mr. Ginsberg?

MR. GINSBERG: Yes, I have.

THE COURT: Do you accept it?

MR. GINSBERG: I do.

THE COURT: I turn to Mr. Barnum, the attorney for the defendant. You have heard the stipulation, Mr. Barnum. Do you accept it?

MR. BARNUM: I do, sir.

THE COURT: Very well. Thank you, gentlemen. You have the thanks of the Court for your intelligent

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Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

cooperation.

MR. BARNUM: And the Court has our thanks.

THE COURT: Very well.

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Exhibit 1 - Verified Complaint Annexed
To Foregoing Affidavit

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL GOTTLIEB, being duly sworn, deposes and says: That he is a member of the firm of GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS., attorneys for plaintiff, with offices at No. 122 East 42nd Street, City, County and State of New York; that he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by the plaintiff is because the plaintiff is not now within the County of New York, which is the county where deponent has his office. Deponent further says that the grounds of his belief as to all matters in the said complaint are from documents obtained and investigations made on behalf of said plaintiff.

SAMUEL GOTTLIEB

Sworn to before me this
27th day May, 1971.

Alan C. Krieger

ALAN C. KRIEGER
NOTARY PUBLIC, State of New York
No. 03-2253300
Qualified in Westchester County
Commission Expires March 30, 1973

Exhibit 2 - Verified Answer Annexed To Foregoing Affidavit

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

VERIFIED ANSWER

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

- x

Defendants, by their attorney, BENEDICT GINSBERG, answering the complaint herein, respectfully allege:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "1" of the complaint.

2. Denies each and every allegation contained in paragraph "2" of the complaint, except they admit that the defendants Leone Bosurgi and Emilio Bosurgi have a place of residence in Italy and elsewhere.

3. Denies each and every allegation contained in paragraph "3" of the complaint, except that the defendants admit that Adriana Bosurgi was the mother of Leone Bosurgi and Emilio Bosurgi and that she died in Italy on or about March 27, 1963.

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Exhibit 2 - Verified Answer Annexed To Foregoing Affidavit

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "7", "8", "9", "10", "11" and "12" of the complaint.

5. Denies each and every allegation contained in paragraph "13" of the complaint, except that the defendants admit that in 1966 an action bearing Index No. 7739/66 was instituted in the Supreme Court, New York County, on behalf of Leone Bosurgi and Emilio Bosurgi against Chemical Bank, and beg leave to refer to the pleadings in that action for the substance thereof.

6. Denies each and every allegation contained in paragraphs "17" and "18" of the complaint, except that such denial by the defendant Ginsberg is on information and belief.

WHEREFORE, defendants demand judgment dismissing the complaint together with costs and disbursements in this action.

BENEDICT GINSBERG
Attorney for Defendants
Office & P.O. Address
475 Fifth Avenue
New York, N. Y. 10017
Tel. MU. 3-7079

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Exhibit 2 - Verified Answer Annexed To Foregoing Affidavit

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

BENEDICT GINSBERG, being duly sworn, deposes and says that he is one of the defendants in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes is to be true.

Sworn to before me this
14th day of July, 1971.

PAUL TEICHMAN
Notary Public, State of New York
No. 30-0917015
Qualified in Nassau County
Commission Expires March 30, 1973

Exhibit 3 - Agreement Dated December 10, 1954 Annexed To Foregoing Affidavit

Messina, 10 dicembre 1954

SCHEMA DI ACCORDO BOSURGI e S.A.I.C.I. MONTEVIDEO

A seguito delle intese verbali fin qui condotte, restano convenuti i seguenti punti:

La S.A.I.C.I., società holding di Montevideo, che tratta per conto di persone che intendono mantenere il riserbo sul loro nome per motivi commerciali di concorrenza, conviene o concorda coi Signori Adriana Bosurgi in solido coi figli Leo ed Emilio, quanto segue:

La parte finanziatrice, per tramite della S.A.I.C.I. ha concesso finanziamenti per il completamento in Concordia (Argentina) di un opificio per la produzione di derivati [illegible], su patente W.Sanderson & Sons, e con la concessione di poter usufruire del nome commerciale Sanderson per la commercializzazione dei suoi prodotti; tale finanziamento viene garantito dal diritto della S.A.I.C.I. di partecipare col 40 per cento delle quote azionarie della Società W.Sanderson & Sons, con sede in Milano e stabilimento in Messina, e a tale proposito parteciperà alla parte dell'aumento di capitale della predetta Società W.Sanderson & Sons di Milano;

la restituzione graduale, secondo piano concordato delle parti, alla finanziatrice avverrà meno veramente a New York in dollari, a banca di New York che la parte finanziatrice sarà per indicare, o con investimenti di portafogli secondo intese che saranno prese con la Signora Bosurgi, alla quale viene assegnata la gestione fiduciaria del deposito relativo, che potrà essere tenuto sotto il suo nome, impegnandosi peraltro a renderne conto, quando richiesta.

Annualmente, o a periodi da prestabilirsi verrà effettuato di comune accordo la contabilizzazione dei profitti, dell'importo dell'ammortamento o degli interessi, stabilendo un saldo che sarà tenuto a libera disposizione sotto il nome della Signora Bosurgi o dei Figli, in gestione fiduciaria della S.A.I.C.I.

Il presente accordo viene firmato in data odierna, e le clausole relative vengono concordate con scrittura riservata, che servirà di base per le contabilizzazioni periodiche, e che verrà sostituita o eliminata con eventuali successivi accordi, che si prenderanno nel corso dell'esecuzione di questi.

In fede,

S.A.I.C.I. Montevideo
Il Presidente

A. Bosurgi

A 53 413

Exhibit 3 - Agreement Dated December 10, 1954 Annexed To Foregoing Affidavit

Messina, December 10,1954

DRAFT AGREEMENT BETWEEN BOSURGI AND S.A.I.C.I. -MONTEVIDEO

Following the verbal agreements carried out up to the present day, the parties hereto agree on the following points :

S.A.I.C.I., a holding company of Montevideo, acting on behalf of people who want to keep their name secret for commercial, competitive reasons, hereby stipulates and agrees with Mrs. Adriana Bosurgi jointly and severally with her sons, Leo and Emilio, what follows :

The financing group, through S.A.I.C.I., has granted the financing for the completion of a plant for the production of citrus by-products in Concord (Argentina), on the W. Sanderson & Sons patent, with the authorization to use the stradé name Sanderson for the purposes of marketing its products. This financing is guaranteed by the S.A.I.C.I.right to participate in the 40% of the shares of the Company W.nSanderson and Sonn, with office in Milan and plant at Messina; tp the same effect

A 414/54

Exhibit 3 - Agreement Dated December 10, 1954 Annexed To Foregoing Affidavit

it will participate at par in the increase of capital of said W. Sanderson & Sons Company of Milan.

According to a plan agreed upon by the parties hereto, repayment to the financing company shall take place gradually by means of deposits in dollars made in New York, into a New York bank to be indicated by the financing group, or by means of interest-bearing investments according to arrangements to be made with Mrs. Bosurgi, to whom the fiduciary administration of the deposits herein shall be entrusted; it can also be held under her own name, provided she commits herself to give full account for it, when so requested.

Yearly, or at periods of time to be set by mutual consent, the parties hereto shall determine profits, amortization amounts and interests, and shall establish a balance to be kept freely at Mrs. Bosurgi's disposal, registered in her name or in the name of her sons, in fiduciary administration for S.A.I.C.I.

The present agreement shall be signed under to-day's date, and the provisions thereto shall

Exhibit 3 - Agreement Dated December 10, 1954 Annexed To Foregoing Affidavit

be stipulated by a simple contract, which will serve as the basis for the periodical accounts; it shallobe eventually substituted or cancelled by subsequent agreements carried out in the course of the performance thereof.

S.A.I.C.I. -MONTEVIDEO

The President

(signature illegible)

A. Bosurgi

In approval :

L. Bosurgi

Emilio Bosurgi

Exhibit 4 - Letter Dated January 26, 1955
Annexed To Foregoing Affidavit

COPIA !.!

26/I/1955

Spett.

S.A.I.C.I.

MONTEVIDEO

Egregio Presidente,

In risposta alla preg/ Sua lettera del 10 u.s., Le inviamo la presente per dichiararci d'accordo sulla modifica della convenzione da noi firmata in data 10 dicembre 1934, concernente l'aggiunta alla riga settima, dopo la parola SAICI, della seguente frase:

"subentrata altresì a tutti i rapporti finanziari fra i Signori Bosurgi e gli azionisti della stessa".

come da Lei richiesto nella predetta lettera.

Consideriamo pienamente valida la convenzione secondo lo "schema" del 10 dicembre u.s., anche prima di ricevere la stesura definitiva, ed efficace a tutti gli effetti.

Gradiscn i nostri più distinti saluti.

G. Bosurgi

E. Bosurgi

E. Bosurgi

A 41757

Exhibit 4 - Letter Dated January 26, 1955
Annexed To Foregoing Affidavit

C O P Y

1/261955

Mess.rs S.A.I.C.I.

MONTEVIDEO

Mr. President:

In reply to your favour of the 20th, inst., we state hereby that we agree to the modification of the agreement signed by us on December 10, 1954, with reference to the rider, in the ninth line, of the following sentence :

"that has also taken over all financial connections between the Bosurgi's and the shareholders of the same", as you requested in the above mentioned letter.

We consider the agreement fully effective and valid in every respect according to the draft of December 10, inst., also before receipt of the final draft.

Very truly yours

A. Bosurgi

L. Bosurgi

E. Bosurgi

Exhibit 5 - Letter Dated January 10, 1959 Annexed To Foregoing Affidavit

9/1

COPIA

Messina, 10 Gennaio 1959

Spett.
S.A.I.C.I.
Montevideo
(Uruguay)

Tanto per Vostra conoscenza Vi comunichiamo che sono stati definiti fino al 31 dicembre 1958 i conti coi Vostri amicianti, e che pertanto la somma in contanti o titoli, secondo distinta sottoposta agli stessi e da essi siglata, hanno consentito di chiudere i conti gli per le gestioni Sanderson Argentina e T.Sanderson & Sons di Milano - Messina (Italia);

Resta confermato che la sottoscritta rimarrà fiduciaria e gestirà in nome proprio, ma per conto vostro le attività esistenti a New York, relative ai saldi di conguaglio, come convenuto.

Tanto per Vostra tranquillità, in attesa di vostra conferma, salutiamo distintamente.

(Adrianna Bonurgi)

...per conferma:

E. Bonurgi

L Bonurgi

C. Bonurgi

Exhibit 5 - Letter Dated January 10, 1959 Annexed To Foregoing Affidavit

COPY

January 10, 1959

Mess.rs S.A.I.C.I.
Montevideo
(Uruguay)

Gentlemen :

We hereby advise you that the accounts with your shareholders were settled up to and including December 31, 1958, and therefore the cash or securities amount, in conformity with the list submitted to the same and marked with their initials, have allowed for the closing of the balance relative to the Sanderson Argentina and W. Sanderson & Sons, Milano-Messina (Italia), administrations.

It is hereby confirmed that the undersigned remains the trustee and will administer in her own name, but on your behalf, the assets existing in New York relative to the final balance, as it was agreed upon.

This to reassure and inform you. Awaiting your kind confirmation, we remain

very truly yours

(Adriana Bosurgi)

For confirmation:

E

E. Bosurgi

L. Bosurgi

60 A 420

Exhibit 6 - Letter Dated January 25, 1961
Annexed To Foregoing Affidavit

COPIA

Messina, 25 gennaio 1961

Spett/

S.A.I.C.I.

MONTEVIDEO

Con la presente Vi comunichiamo che sono stati definiti i conti a tutto il dicembre 1960, e dopo proceduto ai conguagli delle partite di dare e di avere, siamo addivenuti alla definizione dell'importo che rimane a vostra disposizione, secondo i conteggi che abbiamo concordato e che vanno trattenuti riservatamente da ciascuna delle parti.

Resta convenuto, a conferma delle precedenti intese, che gli importi di saldo del vostro conto verranno gestiti fiduciariamente dalla scrivente, ed eventualmente dai sottoscritti in sua assenza, e che il deposito fiduciario in titoli esistente presso la Chemical Bank di New York rimarrà sotto il nome Adriana Bosurgi, la quale ne risponderà alla Vostra società, secondo le precedenti intese.

Distinti saluti.

A. Bosurgi

A. Bosurgi

E. Bosurgi

Exhibit 6 - Letter Dated January 25, 1961
Annexed To Foregoing Affidavit

COPY

Messina, January 25, 1961

Mess.rs S.A.I.C.I.

MONTEVIDEO

Gentlemen :

we advise you hereby that accounts were settled up to and including December 31, 1960, and after settling the debit and credit balance, we determined the amount which remains at your disposal according to the reckonings we agreed upon, and which should be retained reservedly by both parties.

It is understood, in confirmation of the previous agreements, that the balance of your accounts shall be administered by the writer as the trustee, and eventually by the undersigned in her absence, and that the securities fiduciary deposit existing with the Chemical Bank of New York, remains under the name of Adriana Bosurgi, who shall be answerable to your company for the same, according to previous agreements thereof.

Very truly yours

A. Bosurgi

L. Bosurgi

E. Bosurgi

62 A 422

Exhibit 7 - Letter Dated July 12, 1962
Annexed To Foregoing Affidavit

W. SAMDERSON & SONS

COPIA

12 Luglio 1962

Spett.
S/A.I.C.I.
MONTEVIDEO (Uruguay)

Rispondo alla preg/ Vs/ del 23 giugno, dando conferma a quanto in essa comunicatomi, e vi dichiaro che i titoli iscritti a dossier sotto il mio nome rimangono in gestione fiduciaria per vostro conto, fino a che mi diate contrario avviso.

I titoli stessi sono indicati in distinta, che rimane a disposizione vostra e dei vostri mandanti, in qualunque momento mi venga richiesto.

La presente viene sottoscritta anche dai miei figli Leo od Emilio, i quali hanno l'incarico di sostituirmi in caso di mio impedimento.

Gradito distinti saluti

(Adriana Dosurgi)
(Leone Dosurgi)
(Emilio Dosurgi)

63 A 423

Exhibit 7 - Letter Dated July 12, 1962
Annexed To Foregoing Affidavit

COPY

July 12,1962

mess.rs S.A.I.C.I.

MONTEVIDEO (URUGUAY)

Gentlemen:

In answer to your favour of June 23, I confirm its contents and state that the securities listed under my name shall remain in fiduciary administration on your behalf until you advise me of the contrary.

The securities are indicated in the list, which remains at your disposal as well as your principals', whenever requested.

This letter is undersigned also by my sons Leo and Emilio, who are intrusted with the task to substitute me in case of impediment on my part.

Very truly yours

Adriana Bosurgi

Leone Bosurgi

Emilio Bosurgi

Exhibit 8 - Letter Dated August 1, 1962
Annexed To Foregoing Affidavit

W. SANDERSON & SONS

Soc. p. Az. - Capitale Sociale L. 95.000.000 - MILANO

COPIA

Messina, 1/8/1962
Via Cavour n. 2

Spett.le MICI & Company (Uruguay)

Facendo seguito alla Vostra lettera, vi comunichiamo che abbiamo disposto l'acquisto dei seguenti titoli, che verranno depositati nel Vostro Portafoglio presso la Banca col Bank New York Trust Co, a titolo fiduciario, a esecuzione della Vostra lettera col vostri mandatari. Tali titoli verranno trasferiti nel suddetto conto fiduciario per i quali mali che saranno concordati secondo la lettera in corso.

Con distinti saluti,

Banco TITOLI: Anaconda Co n. 750,
Johnsville Corp. n. 250, Vi Con Lola
lon & Co n. 500, Libby Owen n. 800,
Pepsy Cola n. 1000.

In fede,

Per approvazione
E. Bonanni

65 A 425

Exhibit 8 - Letter Dated August 1, 1962
Annexed To Foregoing Affidavit

W. SANDERSON AND SONS

M I L A N O

COPY

Messina, August 1, 1962

Messrs S.A.I.C.I.
MONTEVIDEO (Uruguay)

Gentlemen:

Following the agreements carried out between us, we advise you that we have arranged for the purchase of the securities stated hereunder, which shall be deposited under my name into the Chemical Bank New York Trust Company, as a trusteeship, in compliance with the agreements carried out with your principals; these securities shall be held in the above mentioned fiduciary account and shall be regulated according to the provisions of the agreements under way.

Very truly yours;

LIST OF SECURITIES: Anaconda Co. n750
J. Manville Corp. N.250; Timken Roller
B. Co.N.200, Libby Owen N.200;
Pepsi Cola N.1600

Adriana Bosurgi

For Approval: L. Bosurgi

E. Bosurgi

Exhibit 9 - Letter Dated December 20, 1962 Annexed To Foregoing Affidavit

COPIA

20/12. 1962

Spett.
S.A.I.C.I.
Montevideo

Vi comunichiamo che nell'interesse dei vostri mandanti abbiamo effettuato versamenti per l'importo di $ 300.000 alla Chemical Bank di New York. A conferma degli accordi verbali intervenuti coi predetti Signori l'importo di cui sopra verrà convertito in titoli nordamericani i quali saranno tenuti a dossier fiduciario a ns intestato per vostro conto. La somma predetta, unitamente ai versamenti da noi effettuati alla Sanderson Argentina di Buenos Aires, ammontanti a $ 140.000; eseguiti da giugno a settembre, va a conguaglio dei conti che abbiamo definito nell'incontro coi vostri delegati. Resta inteso che vi impegno di gestire gli importi suddetti e i titoli che terrò a mio dossier, fiduciariamente per conto dei Vostri mandanti, rispondendone a codesta Società.

Distinti saluti.

(Adriana Bosurgi)

per accettazione:

(Leo Bosurgi)
(Emilio Bosurgi)

A 427

Exhibit 9 - Letter Dated December 20, 1962 Annexed To Foregoing Affidavit

COPY

December 20, 1962

Messrs S.A.I.C.I.
MONTEVIDEO

Gentlemen :

We hereby inform you that we have performed deposits in the interest of your customers for the amount of $300,000 into the Chemical Bank of New York.
According to the verbal agreements made with the above mentioned gentlemen, said amount shall be converted into North American securities, which shall be held in trust on hand, in my name for your account. The above mentioned sum as well as the payments we made from June through September to the Sanderson Argentina of Buenos Aires, for the amount of $140,000, goes to balance the accounts we settled in the course of the meeting with your delegates. It is understood that I engage myself to administer the above mentioned sums and securities, which I shall hold in trust on hand in my name on behalf of your principals, and shall be answerable for it to this Company.

Very truly yours

Accepted:

L. Bosurgi

E. Bosurgi

A. Bosurgi

Exhibit 10 - Letter Dated August 5, 1971 Annexed To Foregoing Affidavit

GAINSBURG, GOTTLIEB, LEVITAN & COLE

L GAINSBURG (1888-1967)
SAMUEL GOTTLIEB
MILTON LEVITAN
HAROLD L COLE
EMANUEL BACTICH
WALTER P. ARENWALD
HARRY GIESOW
EUGENE H. FELDMAN
BERNARD BEITEL

RICHARD J. RUBIN
JAMES R. MILLER
ALAN C. KRIEGER

122 EAST 42ND STREET
NEW YORK, N. Y. 10017

TELEPHONE 212-697-3440
CABLE ADDRESS "LAWGAINS"

COUNSEL
ARNOLD FORSTER

August 5, 1971

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Sociedad Anonima de Inversions Comerciales e Industriales v. Leone Bosurgi, Emilio Bosurgi and Benedict Ginsberg

Dear Mr. Ginsberg:

I submit herewith photostats of letters, in Italian, addressed to S.A.I.C.I., with an English translation appended to each, dated December 10, 1954, January 26, 1955, January 10, 1959, January 25, 1961, July 12, 1962, August 1, 1962, December 10, 1962 and January 15, 1963, and bearing the signatures or initials of Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi. Also submitted are photostats of letters from S.A.I.C.I., addressed to Bosurgi, with an English translation appended to each, dated January 20, 1955, February 12, 1955, February 20, 1957, January 30, 1961, November 30, 1961, June 30, 1962, December 18, 1962 and January 2, 1963.

Attached also is a photostat of an affidavit of Salvatore De Domenico, in Italian, dated from Rome in October, 1967, attesting to the fact that the enclosed photostats to which we refer "are photostats of N. 16 original letters or carbon copies drawn from the private files of the said Bosurgi family, which are under my care and custody." De Domenico's signature is acknowledged by Vice Consul Richard N. Dertadian, October 5, 1967 and apparently wax and ribbon sealed.

Unless you dispute the authenticity of the documents or any of the signatures it would be a needless expenditure of time and an unnecessary expense to undertake depositions of your clients, or to issue a Commission or Letters Rogatory to confirm the authenticity and genuiness of the documents and signatures of your clients, of which we have submitted these photostats, and the exactness of the photostats themselves and their translations, and the fact that

A 429

Exhibit 10 - Letter Dated August 5, 1971 Annexed To Foregoing Affidavit

WEINBERG, GOTTLIEB, LEVITAN & COLE

the letters from S.A.I.C.I. to Bosurgi also listed above were duly received by Bosurgi, when this all may be accomplished through the acknowledgment thereof by your cients and office.

Therefore, I ask that you review each of the submitted photostats with your clients, and that you inform me whether or not each submitted photostat and the signature, as well as the affidavit of Salvatore De Domenico in reference thereto are authentic or are disputed, and obtain the acknowledgments requested.

Very truly yours,

Alan C. Krieger

ACK:ET
Enclosures

Exhibit 11 - Letter Dated September 14, 1971 Annexed To Foregoing Affidavit

BENEDICT GINSBERG
COUNSELLOR AT LAW
475 FIFTH AVENUE
NEW YORK, N.Y. 10017
MURRAY HILL 3-7079

PAUL TEICHMAN
CHARLES E. RAMOS
M. J. MORRIS

September 14, 1971

Gainsburg, Gottlieb, Levitan & Cole, Esqs.
122 East 42nd Street
New York, N.Y. 10017

Att. Alan C. Krieger, Esq.

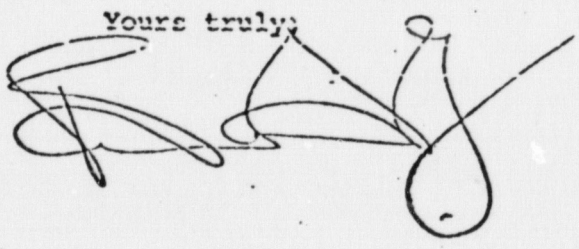
Re: Sociedad Anonima de Inversions Comerciales e Industriales v. Leone Bosurgi, Emilio Bosurgi and Benedict Ginsberg

Dear Sir:

Receipt is acknowledged of your letter of September 13th.

I returned from Europe last week, where I conferred with Mr. Leone Bosurgi and his personal attorney concerning the genuineness and authenticity of the documents which you forwarded to me with your letter of August 5. As a result of that conference, I am authorized to inform you that ..."they are true copies of the originals and they were duly executed by the persons whose signatures appear thereon, and the English translations thereof are true and accurate".

Yours truly,



BG:fs

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- X

LEONE BOSURGI and EMILIO BOSURGI, :

Plaintiffs, :

-against- :

CHEMICAL BANK NEW YORK TRUST COMPANY, :

Defendants. :

- X

Plaintiffs, by Benedict Ginsberg, their attorney, complaining of the defendant herein, allege:

As and for a First Cause of Action

1. That at all times hereinafter mentioned, the defendant was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, engaged in business as a bank and trust company, with its principal office and place of business in the State of New York, County of New York.

2. That at all times hereinafter mentioned, the plaintiffs were depositors in, and maintained accounts with the defendant and the defendant had sole and exclusive custody of all of the records of said accounts, including cancelled checks, statements, and all other documents relating thereto.

3. That at all times hereinafter mentioned, the defendant was the plaintiffs' financial advisor and consultant, the trustee of the plaintiffs' property and interests, in the matters hereinafter described, and the custodian of various assets of the plaintiffs, including corporate stock and other securities, and the defendant had in its possession, among other securities owned by the plaintiffs, but registered in

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Exhibit 12 - Complaint Annexed To Foregoing Affidavit

the name of the defendant or the defendant's nominee, the following:

1,000 shares of American Cyanamid Corporation
800 shares of Chrysler Corporation
2,500 shares of General Foods Corporation
400 shares of Coca Cola Corporation
500 shares of Eastman Kodak Corporation

4. That it was the defendant's duty and obligation to the plaintiffs:

a. to deal fairly with the plaintiffs;

b. to deal with the plaintiffs, in all things, in the utmost good faith;

c. not to be guided by the interests of any third persons in the discharge of its duties and obligations to the plaintiffs;

d. to communicate to the plaintiffs all material facts which the defendant knew or should have known, which related to or affected the plaintiffs' interests, and more particularly the plaintiffs' interests in the stock certificates described above;

e. to preserve said stock certificates;

f. to keep the said stock certificates separate from its own property;

g. not to enter into any agreements which would prevent the delivery to the plaintiffs of the said stock certificates, at any time upon the plaintiffs' demand;

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

h. to hold the said stock certificates solely in the interests of the plaintiffs;

i. not to profit at the expense of the plaintiffs;

j. to avoid giving any advice, making any recommendations, or suggesting any action or course of conduct by the plaintiffs, which could possibly create a conflict of interest, between the defendant's obligations and duties to the plaintiffs and the defendant's own interests, or the interests of any other persons with whom the defendant then or thereafter entered into any financial transactions;

k. to return the said stock certificates to the plaintiffs at any time upon demand.

5. That in truth and in fact the defendant did not deal fairly with the plaintiffs; did not deal with the plaintiffs in utmost good faith; subordinated the interests of the plaintiffs to the interests of third persons in the discharge of its duties and obligations to the plaintiffs; failed to communicate to the plaintiffs all material facts which the defendant knew or should have known which related to or affected the plaintiffs' financial interests and particularly the plaintiffs' interests in the stock certificates described above; failed to preserve the said stock certificates; failed to keep the said stock certificates separate from its own property; entered into agreements which prevented the delivery to the plaintiffs of the said stock certificates upon the plaintiffs' demand; failed to hold the said stock certificates solely in the interests of the plaintiffs; profited at the expense of the plaintiffs; gave advice to the plaintiffs and made recommendations to, and suggested a course of

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

conduct by the plaintiffs which created a conflict of interest between the defendant's obligations and duties to the plaintiffs and the defendant's own interests and the interests of other persons with whom the defendant did business and desired to do business and with whom the defendant thereafter entered into financial transactions to the profit of the defendant; and the defendant failed to return the said stock certificates upon the plaintiffs' demand therefor.

6. Upon information and belief that on or about September 15, 1963, the defendant placed the said stock certificates under the control of persons unknown to the plaintiffs, to be hypothecated by said persons as collateral for a loan or loans in the total amount of $330,000. which the defendant did then and thereafter make to said persons, upon the collateral of the said stock certificates owned by the plaintiffs, all without the plaintiffs' approval and without the plaintiffs' knowledge or consent, and in violation of the defendant's duties and obligations to the plaintiffs more specifically set forth in Paragraph 4 hereof.

7. That the defendant expected to and did in fact earn substantial sums of money by making the aforesaid loans, and could not have made the aforesaid loans if the defendant did not have the plaintiffs' stock certificates in its possession.

8. That the defendant could not have made the aforesaid loans without taking the plaintiffs' stock certificates and transferring the same and placing the same under the control of the persons to whom the defendant made said loans

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

so that said persons could pledge the same with the defendant as collateral for the said loans.

9. That the defendant could not have earned the moneys which it did in fact earn by making said loans, unless the defendant violated its aforesaid obligations to the plaintiffs and unless the defendant placed said stock certificates under the control of the said persons to whom the defendant made the said loans.

10. That the plaintiffs duly demanded delivery of said stock certificates but the defendant has failed and refused to deliver the same to the plaintiffs.

11. That the defendant converted the plaintiffs' said securities to its own use, to the plaintiffs' damage in the sum of $575,000., together with interest thereon.

12. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $575,000.

As and for a Second Cause of Action

13. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" to "10" inclusive hereof, with the same force and effect as if fully set forth herein at length.

14. That for the purpose and with the intent of obtaining the ratification by the plaintiffs of the use of the plaintiffs' stock certificates in the manner described above, the

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

defendant procured the plaintiffs to execute a document, prepared by the defendant, bearing the legend "LETTER OF CONSENT TO PLEDGE AND HYPOTHECATION", referred to herein as the Consent.

15. That the said Consent purported to be an authorization to pledge and hypothecate the plaintiffs' stock certificates for a loan or loans to be made by the defendant to one or more of its customers, simultaneously with the execution of the said Consent by the plaintiffs.

16. That in truth and in fact the said loan or loans had been made a considerable period of time prior to the date when the defendant procured the plaintiffs to execute the said Consent.

17. That the said purported ratification was procured by the defendant in violation of its duties and obligations to the plaintiffs as set forth in Paragraph 4 hereof, and in violation of the defendant's further obligation to the plaintiffs to inform the plaintiffs:

a. that their stock had already in fact been pledged and hypothecated as security for the transaction hereinbefore described;

b. that the plaintiffs were not required to consent to such use of their securities by the defendant;

c. that the plaintiffs were not required to ratify the aforesaid use of their securities by the defendant;

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

d. that the plaintiffs had an absolute and unconditional right to the return of their securities on demand;

e. that if the plaintiffs were unwilling to ratify the said transaction, the Court would require the defendant to return the securities to the plaintiffs, free of any lien or encumbrance, and without any obligation on the part of the plaintiffs with respect thereto.

18. That the Consent procured by the defendant and the ratification sought to be achieved thereby, is null and void.

19. That by reason of the breach by the defendant of the duties and obligations of the defendant to the plaintiffs as herein described, the plaintiffs have been damaged in the sum of $459,852.01, together with interest thereon.

20. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $459,852.01.

As and for a Third Cause of Action

21. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" to "10" inclusive hereof, with the same force and effect as if fully set forth herein at length.

22. That the defendant, purporting to act as the plaintiffs' financial advisor and consultant, entered into a transaction on behalf of the plaintiffs, as a result of which a customer or customers of the defendant, referred to herein.

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

as The Borrower, was enabled to borrow, from the defendant, the sum of $330,000., by using as collateral for said loan, the securities described in Paragraph 3 hereof which were the property of the plaintiffs, but were in the possession of the defendant, as hereinbefore set forth, which said securities the defendant hypothecated in order to make the said loan or loans to its said customer or customers.

23. That in entering into the said transaction on behalf of the plaintiffs, and using the plaintiffs' securities to effect the same, the defendant negligently and carelessly discharged its duty as financial advisor and consultant in that:

a. the collateral which it obtained from The Borrower, for the protection of the plaintiffs and as security for the hypothecation of the plaintiffs' securities, was worthless;

b. the defendant failed to obtain the advice of legal counsel with respect to the validity of said collateral security; the rights of The Borrower to pledge the same; or the existence of liens, prior encumbrances thereon, or third party equities therein;

c. the defendant failed to preserve the priority of the plaintiffs, to the extent of any equity that The Borrower did in fact have in the said collateral security, which said priority, if any existed, could have been preserved by taking appropriate action to establish and preserve the same.

24. That the defendant was further negligent:

a. in failing adequately to investigate and in failing to ascertain the financial responsibility of the persons with whom the defendant entered into the foregoing transaction on behalf of the plaintiffs;

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

b. in failing to ascertain that such persons were financially irresponsible;

c. in failing to ascertain that they did not have or enjoy a good reputation in the financial community;

d. and in failing to ascertain that their previous financial dealings were unsuccessful and that there were unsatisfied judgments of record against them.

25. That by reason of the foregoing, the plaintiffs' securities described in Paragraph 3 hereof were lost to the plaintiffs.

26. That the said loss to the plaintiffs occurred without any fault or negligence on the part of the plaintiffs.

27. That by reason of the foregoing, the plaintiffs have been damaged in the sum of $459,852.01, together with interest thereon.

28. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $459,852.01.

As and for a Fourth Cause of Action

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" to "10" inclusive hereof, with the same force and effect as if fully set forth herein at length.

30. That for the purpose and with the intent to deceive the plaintiffs and to induce the plaintiffs to approve the

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

transaction heretofore described herein and to ratify the use theretofore made by the defendant of the plaintiffs' securities, the defendant falsely and fraudulently represented to the plaintiffs:

a. that The Borrower was the sole owner of the collateral which said Borrower had given to the defendant, for the account of the plaintiffs, as security for the hypothecation of the plaintiffs' securities and for repayment of the said loan or loans, the repayment of which by The Borrower would effect the release of the plaintiffs' securities which the defendant had theretofore hypothecated as collateral for the said loan or loans to The Borrower;

b. that the said collateral received from The Borrower was free of encumbrances;

c. that The Borrower had the sole and unrestricted right to transfer the said collateral to the plaintiffs, and to deliver evidence of such transfer to the defendant, for the account of the plaintiffs;

d. that the execution of the evidences of the transfer of such collateral, which had theretofore been delivered by The Borrower to the defendant, was a sufficient transfer of title therein to the plaintiffs, and that no further act was required to preserve the plaintiffs' right, title and interest therein as the sole owner thereof, unencumbered and unrestricted, and not subject to dilution or diminution, nor to be superseded by others, including but not limited to creditors of The Borrower.

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

31. That the plaintiffs believed the representations to be true and relied upon the same and were thereby induced to approve the said transaction and to refrain from demanding that the defendant return their said securities described above.

32. That the said representations were false and were known by the defendant to be false when the defendant made the same, and were made with the intent to induce the plaintiffs to rely thereon and with the intent to deceive and defraud the plaintiffs.

33. That in truth and in fact, at the time of the making of the said representations by the defendant, The Borrower was not the sole owner of the said collateral; that the said collateral was not free of encumbrances; that The Borrower did not have the sole and unrestricted right to transfer said collateral or to deliver evidences of such transfer; that the evidences of transfer which The Borrower delivered to the defendant were not sufficient to transfer title therein, and that the title of The Borrower, if any, in and to said collateral could be transferred only by appropriate recording procedures, failing which the rights of the plaintiffs to said collateral would not be paramount to but would be on a par with the rights of all of the creditors of The Borrower.

34. That by reason of the foregoing, the plaintiffs have been damaged in the sum of $459,852.01, together with interest thereon.

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

35. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $450,852.01.

As and for a Fifth Cause of Action

36. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" to "5" inclusive hereof, with the same force and effect as if fully set forth herein at length.

37. That the defendant, acting or purporting to act as the plaintiffs' financial advisor and consultant, recommended one Eric H. A. Teran, referred to herein as Teran, to the plaintiffs as a person:

a. with whom it would be desirable for the plaintiffs to do business;

b. to whom it would be desirable for the plaintiffs to lend money;

c. in whom the plaintiffs could safely repose trust and confidence;

d. upon whose business judgment the plaintiffs could rely;

e. whom the plaintiffs could trust to represent their best interests, and properly to safeguard their funds, which funds the defendant knew that the said Teran was proposing that the plaintiffs should invest in a venture in the United States, the management and supervision of which was to be left by the plaintiffs to the said Teran.

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

38. That in recommending Teran to the plaintiffs as aforesaid, the defendant negligently and carelessly discharged its duty as financial advisor and consultant to the plaintiffs in that the defendant failed properly to investigate, or in the course of its investigation, either overlooked or failed to ascertain that:

a. it would not be desirable for the plaintiffs to do business with Teran;

b. it would not be desirable for the plaintiffs to lend money to Teran;

c. Teran was not a person in whom the plaintiffs could safely repose trust and confidence;

d. Teran was not a person upon whose business judgment the plaintiffs could rely;

e. Teran was not a person whom the plaintiffs could trust to represent their best interests nor whom the plaintiffs could trust to safeguard their funds, in a venture in the United States, the management and supervision of which was to be left to Teran.

39. That upon the basis of the defendant's recommendation to the plaintiffs as plaintiffs' financial advisor and consultant, the plaintiffs made loans to the said Teran or investments recommended by him, and which he was to manage and supervise, said loans or investments being advanced by the defendant to the said Teran out of funds of the plaintiffs in the possession of the defendant, amounting in all to the sum of $49,215.47, which said amount the defendant advanced to the said Teran in or about the

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

month of August 1963, from the said funds of the plaintiffs which were then in the possession of the defendant.

40. That the defendant persuaded the plaintiffs to authorize the defendant to advance to and give Teran the sum described above and to charge the same to the plaintiffs' account.

41. That the said sum of $49,215.47 which the defendant paid to the said Teran, from funds of the plaintiffs which were then in its possession, is wholly and totally unrecoverable and uncollectable, and the plaintiffs have not been, and will not in the future, be able to realize or recoup any part thereof, and the same is a total loss.

42. That the said loss to the plaintiffs occurred without any fault or negligence on the part of the plaintiffs.

43. That by reason of the foregoing, the plaintiffs have been damaged in the sum of $49,215.47 together with interest thereon.

44. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $49,215.47.

As and for a Sixth Cause of Action

45. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1" to "5" inclusive hereof, with the same force and effect as if fully set forth herein at length.

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

46. That the defendant, acting or purporting to act as the plaintiffs' financial adviser and consultant recommended that one Vasile Leslie Winkler, also known as Leslie Winkler, and as Vasile L. Winkler, and referred to herein as Winkler, to the plaintiffs as a person:

a. with whom it would be desirable for the plaintiffs to do business;

b. to whom it would be desirable for the plaintiffs to lend money;

c. in whom the plaintiffs could safely repose trust and confidence;

d. upon whose business judgment the plaintiffs could rely;

e. whom the plaintiffs could trust to represent their best interests and properly to safeguard their funds which the defendant knew the plaintiffs had invested in a venture in the United States, in the management of which venture the said Winkler was an active participant.

47. That the defendant recommended to the plaintiffs that a loan by the plaintiffs to the said Winkler in the amount of $100,000. would be a good investment and would enhance and further secure the interests of the plaintiffs in the venture described above.

48. That in recommending Winkler to the plaintiffs as aforesaid, the defendant negligently and carelessly discharged its duty as financial advisor and consultant to the plaintiffs in that the defendant failed properly to investigate, or in the course of its investigation, either overlooked or failed to ascertain that:

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

a. it would not be desirable for the plaintiffs to do business with Winkler;

b. it would not be desirable for the plaintiffs to lend money to Winkler;

c. Winkler was not a person in whom the plaintiffs could safely repose trust and confidence;

d. Winkler was not a person upon whose business judgment the plaintiffs could rely;

e. Winkler was not a person whom the plaintiffs could trust to represent their best interests and properly to safeguard their funds which the defendant knew the plaintiffs had invested in a venture in the United States, in the management of which venture the said Winkler was an active participant.

49. That upon the basis of the defendant's recommendation to the plaintiffs as plaintiffs' financial advisor and consultant, as more specifically hereinbefore set forth, the plaintiffs made a loan to the said Winkler in the amount of $100,000., which said amount the defendant advanced to the said Winkler on or about December 11, 1963, from the funds of the plaintiffs which were then in the possession of the defendant.

50. That the defendant persuaded the plaintiffs to authorize the defendant to give Winkler the sum described above and to charge the same to the plaintiffs' account.

51. That the said sum of $100,000. which the defendant paid to the said Winkler, and the further sum of $1,463. which the defendant charged to the plaintiffs' account as

Exhibit 12 - Complaint Annexed To Foregoing Affidavit

interest on said sum, all, from the funds of the plaintiffs which were then in its possession, is wholly and totally unrecoverable and uncollectable, and the plaintiffs have not been and will not in the future be able to realize or recoup any part thereof, and the same is a total loss.

52. That the said loss to the plaintiffs occurred without any fault or negligence on the part of the plaintiffs.

53. That by reason of the foregoing, the plaintiffs have been damaged in the sum of $101,463., together with interest thereon.

54. That the plaintiffs claim punitive damages against the defendant for its acts and conduct above set forth, in the amount of $101,463.

WHEREFORE, plaintiffs demand judgment against the defendant on the first cause of action in the amount of $1,150,000.; or in the alternative on the second or the third or the fourth causes of action in the amount of $919,704.02; on the fifth cause of action in the amount of $98,430.94, and on the sixth cause of action in the amount of $202,926., and in each instance with interest and the costs and disbursements of this action.

BENEDICT GINSBERG
Attorney for Plaintiffs
Office & P. O. Address
475 Fifth Avenue
New York, New York 10017

[Verified by Benedict Ginsberg 5/10/66.]

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Exhibit 13 - Stipulation Annexed
To Foregoing Affidavit

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART XVII.

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LEON BOSURGI and EMILIO BOSURGI, :

Plaintiffs, :

-against- : Index Number 7939/66

CHEMICAL BANK NEW YORK TRUST COMPANY, : STIPULATION

Defendant. :

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New York, N. Y.
September 15, 1970.

B e f o r e :

HON. WILLIAM KAPELMAN, Justice.

A p p e a r a n c e s :

BENEDICT GINSBERG, ESQ.,
Attorney for Plaintiffs,
475 Fifth Avenue
New York, N. Y.

Messrs. CRAVATH, SWAINE & MOORE,
Attorneys for Defendant,
1 Chase Manhattan Plaza
New York, N. Y.
By: JOHN W. BARNUM, ESQ., of counsel.

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Alfred H. Ehrlich, C.S.R.,
Official Court Reporter.

Exhibit 13 - Stipulation Annexed
To Foregoing Affidavit

The action is settled for the sum of $215,000.00, to be paid within ten days from the date hereof, upon the following terms and conditions:

(1) Counterclaims are withdrawn, with prejudice.

(2) Prior to payment, the plaintiffs shall deliver to the defendant general releases running to the defendant and such of its employees or former employees as the defendant desires to be included in the releases, notification of such persons to be made by the attorneys for the defendant to the attorney for the plaintiff within seven days from the date hereof.

(3) The proceeds of the settlement are to be paid to Benedict Ginsberg, attorney for plaintiffs, and held by him in escrow pending determination of claims asserted by the Internal Revenue Service of the United States Government against the defendant arising out of their relationship as banker, depository or custodian of the funds of the plaintiffs or their late mother, Adrianna Bosurgi.

(4) Pending the determination of the aforesaid claims, the entire amount of the settlement,

Exhibit 13 - Stipulation Annexed
To Foregoing Affidavit

together with such interest or increment that may accrue thereon, shall be held in escrow in the form of certificates of deposit or bankers acceptances issued by and purchased or acquired through such bank or trust company in the Borough of Manhattan as the defendant may select, the selection to be made within five days from the date hereof.

This settlement is made without any interest, costs or disbursements to any of the parties, and the costs to which reference is made shall include costs to abide the event as determined in previous appeals.

In the event of any dispute or difference of opinion with respect to the terms hereof or the manner of effecting the same or the obligation of plaintiffs' attorney with respect to the escrow funds, such issue or issues shall be referred to Mr. Justice Kapelman for determination by him as an arbitrator, either upon affidavits or upon testimony, as he may deem appropriate, with the decision which he may render on such issues to be deemed the decision of an arbitrator, it being

Exhibit 13 - Stipulation Annexed
To Foregoing Affidavit

understood that this method is being selected so that the determination so made shall be final and non-appealable.

It is intended by the parties that this settlement is now concluded and is in full force and effect. Notwithstanding, the parties shall agree upon a formal written stipulation which shall embody all of the terms as hereinbefore set forth in addition to the material to be supplied by each of the parties.

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THE COURT: Now I turn to the attorney for the plaintiff. You have heard the stipulation, Mr. Ginsberg?

MR. GINSBERG: Yes, I have.

THE COURT: Do you accept it?

MR. GINSBERG: I do.

THE COURT: I turn to Mr. Barnum, the attorney for the defendant. You have heard the stipulation, Mr. Barnum. Do you accept it?

MR. BARNUM: I do, sir.

THE COURT: Very well. Thank you, gentlemen. You have the thanks of the Court for your intelligent

Exhibit 1 - Stipulation Annexed
To Foregoing Affidavit

cooperation.

MR. BARNUM: And the Court has our thanks.

THE COURT: Very well.

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Exhibit 14 - Order To Show Cause
Annexed To Foregoing Affidavit

MHS:rc

71 CIV. 928

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

LEON BOSURGI AND EMILO BOSURGI AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AND CHEMICAL BANK AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED: AND LEON BOSURGI AND EMILO BOSURGI,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Civ.

Upon motion of the United States Attorney for the Southern District of New York, and the annexed verified complaint, let the above named defendants show cause before this Court at 10:00 o'clock in the forenoon on the 9th day of March, 1971, or as soon thereafter as counsel can be heard, in Courtroom 506, United States Courthouse, Foley Square, New York, New York, why a preliminary injunction should not be issued restraining the defendant Chemical New York Bank from paying over to the defendants Leon Bosurgi and Emilo Bosurgi the sum of $215,000, and directing the defendant Chemical New York Bank to deposit the aforementioned fund of $215,000 in an interest bearing account pending a final determination of this action; and it is further

Exhibit 14 - Order To Show Cause
Annexed To Foregoing Affidavit

HS:ro

ORDERED that the defendant Chemical is hereby restrained from transferring to any person, including but not limited to the other defendants herein, their attorneys, agents employees or others associated with them, any property whatsoever, including but not limited to any amounts payable pursuant to any settlement agreement or order in this action pending in the Supreme Court, New York County entitled Leon Bosurgi and Emilo Bosurgi v. Chemical New York Bank, Docket No. 7939-66, pending the hearing and determination of the motion for the preliminary injunction herein; and it is further

ORDERED that the defendants Leon Bosurgi and Emilo Bosurgi, their attorneys, agents, employees, or others associated with them, are hereby restrained from transferring to any person or from themselves from the jurisdiction of this Court any amounts received in the settlement of the above described action now pending in the Supreme Court, New York County pending the hearing and determination of the motion for the preliminary injunction herein; and it is further

ORDERED that service of a copy of this order and the verified complaint herein upon defendants shall be made on or before 5:00 P.M. on the 2nd day of March, 1971, and such service shall be deemed good and sufficient service hereof.

Dated: New York, New York
March 2, 1971

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Exhibit 15 - Order Annexed To
Foregoing Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

ORDER

- v - : 71 Civ. 928

LEON BOSURGI and EMILO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased, and CHEMICAL BANK, et al., :

Defendants. :

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The motion of the United States of America for a preliminary injunction having been made upon the verified complaint of the United States of America, and having come on for a hearing before the Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, and upon oral argument of counsel for plaintiff, defendant Chemical Bank, and Benedict Ginsberg, Esq., it is hereby

ORDERED that the motion of the United States of America for a preliminary injunction is denied subject to the following:

(1) That within ~~20~~ days from the date of entry of this order, defendant Chemical Bank pay over to Benedict Ginsberg, attorney for the defendants Leon and Emilo Bosurgi in a proceeding in the Supreme Court, New York County, New York, entitled Leon and Emilo Bosurgi v. Chemical New York Bank, Docket No. 7929/66, the sum of

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Exhibit 15 - Order Annexed To
Foregoing Affidavit

71-0572

$215,000, which sum is the amount to be paid under a settlement entered into by and between the parties to the said State court action; and further

(2) That the said Benedict Ginsberg, Esq. purchase with the said $215,000, certificates of deposit of the Chase Manhattan Bank; and further

(3) That the said Benedict Ginsberg, Esq. have and hold the said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000.

Dated: New York, New York

March 16, 1971

Irving R. Kaufman

U. S. D. J.

Notice of Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

This case has not been assigned to an I.C. Part

SOCIEDAD ANONIMA de INVERSIONS COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

CROSS-NOTICE OF MOTION

Index No. 22140/71

S I R S :

PLEASE TAKE NOTICE THAT upon the annexed affidavit of BENEDICT GINSBERG, sworn to the 20 day of October, 1971, and the exhibits annexed thereto, the undersigned will cross-move this Court at Special Term, Part I thereof at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 4th day of November, 1971, the return date of the plaintiff's motion, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order fixing the fee of the defendant Benedict Ginsberg and authorizing him to retain out of the monies now held by him in escrow the sum of $78,800.19, plus 40% of the interest and increment accruing on the sum of $215,000.00 heretofore delivered to him in escrow and subject to the order of the United States District Court for the Southern District of New York, and for such other and further relief in the premises as may be proper.

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Notice of Cross-Motion

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, shall be served upon the undersigned at least five (5) days before the return date of this motion.

Dated, New York, N. Y.,
October 20th, 1971.

BENEDICT GINSBERG
Attorney for Defendants
Office & P. O. Address
475 Fifth Avenue
New York, N. Y. 10017

TO: GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
Attorneys for Plaintiff
122 East 42nd Street
New York, N. Y. 10017

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
United States Courthouse
Foley Square
New York, N. Y. 10007

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Chemical Bank
New York Trust Company
1 Chase Manhattan Plaza
New York, N. Y. 10005

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Affidavit Of Benedict Ginsberg In Opposition To Motion And In Support Of Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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SOCIEDAD ANONIMA de INVERSIONS COMERCIALES e INDUSTRIALES,

Plaintiff,

AFFIDAVIT IN OPPOSITION

-against-

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am the attorney for the defendants Leone Bosurgi and Emilio Bosurgi, referred to herein as "the Bosurgis", and in my capacity as the escrow holder of the moneys described in the moving affidavit, I am also a party defendant.

This affidavit is submitted in opposition to the plaintiff's motion for summary judgment, to the extent that the motion requests an order directing me to turn over the moneys I hold in escrow.

On August 12, 1971 I conferred with my clients, in Europe, at a conference attended by their personal attorney. At that conference they acknowledged to me that the documents which the plaintiff's attorney had forwarded to me with his letter of August 5, 1971, a copy of all of which were delivered

A 460 Affidavit Of Benedict Ginsberg In Opposition To Motion And In Support Of Cross-Motion

by me to my clients, were genuine and authentic; that said documents were duly executed by the persons whose signatures appeared thereon; and that the English translation attached to said letters were true and accurate. In this context it should be noted that the defendant Leone Bosurgi has a thorough knowledge of the English language. He was examined before trial in the action brought by the Bosurgis against Chemical Bank, whose counsel, having conducted said examination, is fully aware of Leone Bosurgi's fluency in the English language.

At the conference on August 12, 1971 my clients also acknowledged to me that the obligation asserted in the complaint herein has not been satisfied and that they are unable to suggest any basis upon which they could properly request me to oppose plaintiff's motion for summary judgment. Accordingly I cannot oppose the motion, except to the extent described below.

I object to that portion of the motion which seeks an order directing me to turn over the escrow money to the plaintiff. The basis of my objection is that I have a lien on the moneys, for my services. The escrow money came into existence solely by reason of my efforts in the action by the Bosurgis against Chemical Bank to which reference is made in the moving affidavit. I am confident that neither plaintiff's attorneys, nor the attorneys for Chemical Bank, nor the U. S. Attorney for the Southern District, will dispute this assertion.

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Affidavit Of Benedict Ginsberg In Opposition To Motion And In Support Of Cross-Motion

Accordingly, I request, by the cross-notice of motion submitted herewith, that this Court direct the payment to me of my fee, as set forth below, and direct payment of the balance as this Court may deem appropriate, all subject to the order of the United States District Court to which further reference is made below.

After the action which I instituted on behalf of the Bosurgis against Chemical Bank was settled, I was required to make an application to this Court for an order directing Chemical Bank to pay the proceeds of the settlement to me, to be held in escrow by me, pursuant to the terms of the Stipulation of Settlement, which was dictated on the record, by and with the assistance of the Court.

Before my said application was determined, the United States of America brought a proceeding to direct the payment of the proceeds of the said settlement in a manner different from that provided in the Stipulation of Settlement. The application came on before United States District Judge Dudley B. Bonsal who denied the Government's motion and ordered Chemical Bank to pay over to me, as escrowee, the said Two Hundred Fifteen Thousand ($215,000) Dollars, with which sum I was to purchase a Certificate of Deposit of The Chase Manhattan Bank, which said Certificate I was to hold subject to further order of the United States District Court "which may be made with regard to the rights of the United States of America, or any other claimant to the said $215,000".

Chemical Bank took an appeal from the aforesaid order. The United States Court of Appeals for this Circuit unanimously affirmed.

If this Court should grant plaintiff's motion for summary judgment, the claim of the United States of America, based as it is on the contention that the moneys which I hold in escrow, were the property of Adriana Bosurgi, the late mother of the Bosurgis, must fall.

The only question remaining for consideration is thus the amount of my fee. I was retained pursuant to the agreement which is Exhibit "A" hereof. Various payments were made to me from time to time on account of that portion of my fee, which is not contingent, all as provided for in the agreement, and some of the disbursements referred to in the said retainer were paid to me from time to time as they were incurred.

At my conference in Europe on August 12, 1971 I had my clients confirm the amount due me. A copy of such confirmation, is annexed hereto as Exhibit "B" hereof. The Court will note from Exhibit "B" that I am entitled to receive the sum of Seventy-seven Thousand Eight Hundred Six and 14/100 ($77,806.14) Dollars plus Nine Hundred Ninety-four and 05/100 ($994.05) Dollars of disbursements advanced but not yet reimbursed to me, plus forty (40%) per cent of such sums as have or will hereafter accrue on the Two Hundred Fifteen Thousand ($215,000) Dollars which has been invested in a Certificate of Deposit as above indicated.

Affidavit Of Benedict Ginsberg In Opposition To Motion And In Support Of Cross-Motion

Since the only persons who have an interest in my fee or the manner in which it is computed, have agreed to the computation which is set forth in Exhibit "B" hereof, the order to be made hereon should direct the payment of my fee, in accordance with the provisions of Exhibit "B" hereof, subject however to the further order of the United States District Court for the Southern District of New York. Upon the entry of an order by this Court, such as requested above, I will promptly make application to the said United States District Court for permission to disburse the proceeds of the escrow money as directed by the order of this Court.

In view of the foregoing I hereby respectfully request that my cross-motion be granted and that my fee be fixed at, and that I be authorized and permitted to retain out of the sum I hold in escrow, as and for my fee and for my disbursements, the sum of $78,800.19, plus 40% of the amount which will accrue as interest on the sum of $215,000.00 heretofore paid to me in escrow, as aforesaid.

Benedict Ginsberg

Sworn to before me this
20th day of October, 1971.

PAUL TEICHMAN
Notary Public, State of New York
No. 30-0917015
Qualified in Nassau County
Commission Expires March 30, 1973

Exhibit A - Retainer Annexed To
Foregoing Affidavit

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Dear Sirs,

We hereby retain your services to represent us in connection with a legal action to be instituted against Chemical Bank New York Trust Company and, if deemed appropriate by you, against other defendants to recover damages sustained by us in connection with certain loans and other investments principally involving Expositions de France, Inc. and one Leslie Winkler.

In consideration of the services rendered and to be rendered by you in connection with said action and the preparation thereof, the following terms of compensation, which we are hereby confirming, have been agreed upon between us.

1. You will receive a fixed fee totalling $17,500.00, payable as follows:

   $8,500.00 - immediately,

   $4,500.00 - prior to the commencement of pre-trial proceedings,

   $4,500.00 - when the case is placed on the trial calendar or, if the litigation terminates earlier, upon its termination.

2. In addition to said fixed fee, you will receive a contingent fee equivalent to 40% of that portion of the amounts recovered by way of judgment or settlement, which is in excess of $17,500 and of disbursements hereafter incurred.

3. The foregoing fixed fees and contingent fees shall be deemed also to constitute full compensation for such services as may hereafter be rendered in this matter by

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Exhibit A - Retainer Annexed To
Foregoing Affidavit

4. In addition to the fees payable by us as hereinabove provided, we agree to reimburse you for all out-of-pocket expenses heretofore or hereafter incurred by you, or by any one of you, on our behalf in connection with the investments, loans and claims referred to above, to the extent that such expenses are not covered by the sum of $1,400.00 previously advanced by us against disbursements. Such reimbursement, will be made by us from time to time, upon receiving your respective expense statements.

Dated: 1966

Dr. Emilio Bosurgi

Dr. Leone Bosurgi

Approved:

Prof. Avv.
Domenico Barillaro

Exhibit B - Letter dated August 12, 1971
Annexed To Foregoing Affidavit

August 12, 1971

Benedict Ginsberg, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Bosurgi v. Chemical Bank

Dear Sir:

This will confirm our understanding with respect to fees in the above matter.

Pursuant to the terms of our retainer, dated December 1966, you were to receive and you have received the sum of $17,500. You were also to receive a contingent fee of 40% of the amount of the recovery in excess of said sum of $17,500 and of the disbursements thereafter incurred, which, if advanced by you, would be reimbursed by us. Total disbursements were incurred in the amount of $2,984.65. Accordingly, your 40% is to be computed on the total recovery in excess of $17,500 plus $2,984.65, to wit, $20,484.65. You were holding in escrow a certificate of deposit issued April 29, 1971 by Chase Manhattan Bank in the amount of $215,000. 40% of the net of $215,000 minus $2,984.65 is $77,806.14. You are to receive that sum plus $994.05, which you spent in disbursements not previously reimbursed to you. You are also to receive 40% of the sums which have accrued or will hereafter accrue on the $215,000 and on the increment thereof.

Yours truly,

Leone Bosurgi

P.S. I acknowledge receipt of a photocopy of the renewed Certificate of Deposit dated July 28, 1971 in the amount of $217,485.94, which amount represents the sum originally deposited together with accrued interest thereon to July 28, 1971. I understand that you will "roll over" this amount, from time to time, until you are permitted by an appropriate order of the court to disperse the funds.

Leone Bosurgi

Affidavit Of John A. Lucido
In Opposition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

This case has not been assigned to an I.C. Part

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES,

Plaintiff,

-against-

LEONE BOSURGI, EMILIO BOSURGI and BENEDICT GINSBERG,

Defendants.

AFFIDAVIT

Index No. 22140/71

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

JOHN A. LUCIDO, being duly sworn, deposes and says:

1. I am an attorney associated with Cravath, Swaine & Moore, attorneys for Chemical Bank (hereinafter "the Bank") in two pending actions involving the Bosurgi brothers, one in this Court, Bosurgi v. Chemical Bank, Index No. 7939/66, and one in the United States District Court for the Southern District, United States v. Bosurgi, 71 Civ. 928. I submit this affidavit on behalf of the Bank in opposition to (a) the motion of plaintiff to consolidate this action with Bosurgi v. Chemical Bank and (b) the cross-motion of the defendants for an order fixing Mr. Ginsberg's fee and authorizing him, subject to the order of the Federal Court, to retain the amount so fixed out of the funds paid by the Bank to him as escrowee in settlement of Bosurgi v. Chemical Bank.

2. In Bosurgi v. Chemical Bank the Bosurgis claimed that in the latter part of 1963 the Bank made an unauthorized investment of securities held by them in a joint custodian account at the Bank. The Bosurgis' claim was settled on September 15, 1970, when they and the Bank dictated on the record the stipulation annexed to the complaint herein as Ex. 2.

3. Under the terms of that stipulation, $215,000 was to be paid by the Bank to Mr. Ginsberg as escrowee pending determination of IRS claims asserted against the Bank arising out of its relationship as custodian of the funds of the Bosurgi brothers or of their mother, Mrs. Adriana Bosurgi. In addition, the stipulation provided that the parties shall agree upon a formal written stipulation which would incorporate the substantive terms of the stipulation dictated on the record in addition to new matters to be negotiated by the parties. The stipulation dictated on the record did not contain any provision for discontinuance of the action.

4. Thereafter, the parties exchanged drafts (each of which contained a provision for discontinuance) but were unable to agree upon a formal written stipulation. Mr. Ginsberg then applied in the action for an order to enforce the settlement by directing Chemical to pay to him as escrowee the sum of $215,000. While that application was pending, the parties were temporarily restrained by order of the United States District Court (Ex. 14 to Gottlieb Aff.) at the instance of the United States Government which had made jeopardy assessments against the Bosurgi brothers and the Bank, each in excess of $215,000, and had commenced

the aforesaid action, United States v. Bosurgi.

5. The custodian account of the Bosurgi brothers was the successor of a custodian account opened at the Bank by and in the name of Mrs. Bosurgi in 1954. Mrs. Bosurgi's custodian account agreement provided for powers of attorney in the two brothers. In April 1963 Leone Bosurgi exercised his power of attorney and instructed the Bank to close out his mother's custodian account and to open a new custodian account in his name and that of his brother. Prior to causing the transfer of the funds, Leone Bosurgi failed to inform the Chemical Bank officer with whom he was dealing that Mrs. Bosurgi had died the prior month.

6. In United States v. Bosurgi the United States claims that the securities in the Adriana Bosurgi custodian account at the time of her death in March 1963 were owned by her and are includible in her taxable estate; and that the Bosurgi brothers, as transferees, and the Bank, as custodian, are liable for the estate taxes owing. The complaint asks, among other things, for the United States District Court to find that the United States has valid liens for its tax claims and to foreclose those liens against the Bosurgi v. Chemical Bank settlement fund.

7. The Bank has answered in United States v. Bosurgi, denying any liability, and has asserted cross-claims against the Bosurgi brothers. Those claims allege that, if the Bank is held liable, the Bosurgis are liable over to the Bank principally because of Leone Bosurgi's failure to disclose his mother's death at the time the power of attorney was exercised. To the Bank's knowledge, no

other defendant has answered. The cross-claims, which were served on Mr. Ginsberg pursuant to CPLR § 303, have not been answered and the Bosurgis, through Mr. Ginsberg, have moved to vacate and set aside the Bank's service of third-party process.

8. The motion of the United States for a preliminary injunction enjoining transfer of the settlement funds to Mr. Ginsberg pursuant to the stipulation was denied by the Hon. Dudley B. Bonsal on March 18, 1971 (Ex. 15 to Gottlieb Aff.), subject to the Bank paying over the $215,000 to Mr. Ginsberg and his purchase of certificates of deposit to be held in escrow "subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to said $215,000".

9. Thereafter, the Bank complied with Judge Bonsal's order and, on information and belief, Mr. Ginsberg advised this Court that his application for an order directing payment was thereby rendered moot.

10. On June 10, 1971, Mr. Ginsberg wrote to Mr. Justice William Kapelman, with whose assistance Bosurgi v. Chemical Bank had been settled, requesting him to schedule a hearing at which his fees would be fixed. In that letter Mr. Ginsberg disclosed that this action had been instituted. Copies of the letter were sent to attorneys for the Bank, the United States and plaintiff.

11. The Bank responded to Mr. Ginsberg's letter by objecting to the stated purpose of the hearing and the

manner in which the application had been made. The Bank argued in that letter that the stipulation narrowly limited remaining areas for possible future adjudication. The stipulation in this regard had provided:

> "In the event of any dispute or difference of opinion with respect to the terms hereof or the manner of effecting the same or the obligation of plaintiffs' attorney with respect to the escrow funds, such issue or issues shall be referred to Mr. Justice Kapelman for determination by him as an arbitrator, either upon affidavits or upon testimony, as he may deem appropriate, with the decision which he may render on such issues to be deemed the decision of an arbitrator, it being understood that this method is being selected so that the determination so made shall be final and non-appealable."

12. The Bank also contended that the question of Mr. Ginsberg's fee was not a dispute or difference of opinion with respect to the terms of the stipulation or the manner of effecting the same or the obligations of Mr. Ginsberg with respect to the escrow fund. The stipulation clearly provided that the "entire amount of the settlement" should be held in escrow pending determination of the claims and the intent of that provision just as clearly was to ensure that the "entire amount" would be available for satisfaction of those claims if they were ultimately upheld. In fact, the question of Mr. Ginsberg's fees was not raised until February 23, 1971, when, at a hearing on the Bosurgis' application for an order directing payment, the Bank advised the Court that the IRS opposed payment over of the $215,000 pursuant to the stipulation and Mr. Justice Kapelman himself raised the possibility of a new compromise agreement of the parties, which might be satisfactory to the IRS, whereby the Bank would release to Mr. Ginsberg a portion of the settlement fund which would earn [illegible] his fees and would hold the balance in a joint account with

Mr. Ginsberg to be maintained at the Bank pending determination of the IRS claims. (Subsequently, the parties explored the compromise suggested by the Court but were unable to reach agreement.)

13. Over the protests of the Bank, Mr. Justice Kapelman granted Mr. Ginsberg's request for a hearing and the Bank, as a courtesy to the Court, agreed to attend. The conference before Mr. Justice Kapelman took place in his chambers on June 23, 1971, and was attended by Mr. Ginsberg and attorneys for plaintiff, the United States and the Bank. Mr. Justice Kapelman indicated that the Bank had raised a serious question as to his power under the stipulation to fix Mr. Ginsberg's counsel fees and that in any event Mr. Ginsberg would have to proceed on papers with notice to all interested parties. In the four months that have elapsed since that conference with Mr. Justice Kapelman, Mr. Ginsberg has not applied in Bosurgi v. Chemical Bank for an order fixing his fee and there is no matter presently pending in that action, plaintiff's assertions to the contrary notwithstanding. In view of defendants' cross-motion in this action, we assume Mr. Ginsberg would concede that a similar application is not now pending in Bosurgi v. Chemical Bank.

14. The Bank contends that consolidation of this action with Bosurgi v. Chemical Bank would be entirely improper. There are no common questions of law or fact; indeed, there is no question at all now pending in Bosurgi v. Chemical Bank. Moreover, any issues which may properly be raised in the future under the terms of stipulation do not encompass questions of title or questions of liens,

whether asserted by Mr. Ginsberg or the United States Government. Far from simplifying matters, consolidation of a newly commenced action, in which there has been no discovery and to which the Bank is not a party, with one commenced in 1966 and settled in 1970 would only unfairly complicate and prolong the final administration of the settlement stipulation. For example, if the actions were consolidated over the Bank's protest, it is unknown whether, as provided in the stipulation, future determinations will be final and non-appealable.

15. The Bank takes no position on the merits of plaintiff's summary judgment motion.

16. We would note, with respect to that summary judgment motion, that the United States is an adverse claimant to the fund; and that the Federal Court has said that the fund is impressed with any and all liens of the United States, subject to any further order which it may make with regard to the rights of claimants to the fund. Accordingly, it would have been more orderly if, instead of moving for summary judgment in an action to which the United States was not a party, plaintiff had sought to intervene in United States v. Dosurgi in order to establish its claimed entitlement to the fund. Judge Bonsal's order indicates that such a request for intervention would have been readily permitted. In any event, in view of the outstanding Federal Court order it would be appropriate for this Court as a matter of comity and in the interests

of the orderly administration of the adverse claims to deny the summary judgment motion at this stage of litigation without prejudice.

17. The same reasons which suggest that the summary judgment motion at this time should be denied without prejudice require a similar disposition with respect to defendants' cross-motion. In that connection, it is relevant that Mr. Ginsberg stated on reargument of the preliminary injunction motion that he is "not particularly concerned about when [his] fee is paid" (Tr. 39). Certainly any question of Mr. Ginsberg's entitlement to an award of counsel fees out of the settlement fund is inextricably tied to the question of title raised by plaintiff and the validity of the liens claimed by the United States.

18. If the United States intervenes in this action and if this Court should determine that rightful title is in plaintiff and that the aforesaid claims of the United States are without merit, then the Bank would be neutral with respect to Mr. Ginsberg's fee application. On the other hand, if the United States intervenes and this Court upholds its claims, then the Bank contends that Mr. Ginsberg is not entitled to an award of counsel fees out of the settlement fund because (a) by agreeing to a stipulation providing for the "entire amount of the settlement" to be held available for satisfaction of the IRS claims, he conditionally waived whatever rights he might otherwise have had to such an award and (b) the Government's liens under the Internal Revenue Code would

include a special estate tax lien which attached to the securities at the time of Mrs. Bosurgi's death in March 1963, well before Mr. Ginsberg's lien, if any, attached to the settlement fund to which those securities may be traced. In fact, any lien of Mr. Ginsberg has not yet attached, as Judge Bonsal repeatedly stressed on reargument of the Government's preliminary injunction motion:

"THE COURT: . . .

"I don't think you have a lien because the money is now in Chemical Bank and it is a settlement without costs and disbursements and so it seems to me that your lien attaches as to any money that these young Bosurgis might get when and if they get any. It seems to me that is where your lien will attach, but I don't think there is any lien now.

"MR. GINSBERG: With all due respect, I think my lien attaches when the action was instituted, but we need not determine that issue.

"THE COURT: You are quite clear there is no lien on the fund as you are holding here as escrowee.

"MR. GINSBERG: Not because I am going to hold it as escrowee.

"THE COURT: I understand there is no lien at all on the fund and that would be something that will materialize when the dispute is resolved. All right." (Tr. 51)

John A. Lucido

John A. Lucido

Sworn to before me this
29th day of October 1971.

John J. Murphy

Notary Public

JOHN MURPHY
Notary Public, State of New York
No. [illegible]
Certificate filed in New York County
Commission Expires March 30, 1973

(Printed herein at page 33)

(Printed herein at page 49)

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CERTIFICATE PURSUANT TO CPLR 2105

I, ALAN C. KRIEGER, an attorney-at-law associated with the firm of GAINSBURG, GOTTLIEB, LEVITAN & COLE, attorneys for the plaintiff-appellant-respondent in this action, do hereby certify pursuant to CPLR Rule 2105 that the foregoing record on appeal has been compared by me with the originals on file in the Office of the Clerk of the County of New York and found to be true and complete copies of said originals and the whole thereof of the notices of appeal, the order appealed from and all the papers which were used in the court below and which are specified in the order appealed from and the whole thereof now on file in the Office of the Clerk of New York County.

Dated: April 12, 1973.

Alan C. Krieger

A 479

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
FEB 25 4 25 PM '75

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI, et al.,

Defendants.

OPINION AND ORDER

71 Civ. 928

#4944

APPEARANCES:

HONORABLE PAUL J. CURRAN
United States Attorney
Attorney for Plaintiff
By: DAVID P. LAND, ESQ.
Assistant United States Attorney
Of Counsel

BENEDICT GINSBERG, ESQ.
Pro Se Defendant Attorney

GAINSBURG, GOTTLIEB, LEVITAN & COLE, ESQS.
Attorneys for Defendant Sociedad Anonima de Inversiones Comerciales e Industriales ("SAICI")
By: SAMUEL GOTTLIEB, ESQ.
ALAN C. KRIEGER, ESQ.
Of Counsel

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Defendant Chemical Bank New York Trust Company
By: ANDREW TASHMAN, ESQ.
Of Counsel

FEB 26 1975

A 480

KEVIN THOMAS DUFFY, D.J.

The United States of America (hereinafter "United States"), Chemical Bank New York Trust Company (hereinafter "Chemical Bank"), Benedict Ginsberg (hereinafter "Ginsberg") and the Sociedad Anonima de Inversiones Comerciales e Industriales (hereinafter "SAICI") have each moved for summary judgment in this tax proceeding.1/ The United States, as plaintiff in this action, is attempting to obtain a judgment for the federal taxes allegedly due from the estate of Adriana Bosurgi, an Italian citizen and non-resident alien of the United States. The original defendants herein were Chemical Bank and Leone and Emilio Bosurgi, the sons of Adriana Bosurgi. SAICI and Ginsberg were later added as defendants.

This action is intimately related to two earlier lawsuits in New York State courts involving the same parties (except for the United States). In 1966, Ginsberg was retained by the Bosurgi brothers to sue Chemical Bank for alleged mismanagement of a custodian account at Chemical Bank which had been opened by their mother in 1954, and which was maintained in their names after her death in 1963. The suit was filed in 1966, and on September 15, 1970, a stipulation settling the suit for $215,000 was dictated into the record in open court. However, before Chemical Bank paid

any money to the Bosurgis, this suit was instituted on March 2, 1971. Shortly thereafter this Court entered an order, dated March 18, 1971, that required Chemical Bank to pay $215,000 to Ginsberg, who was to hold the amount in escrow pending further order of this Court. Then in June 1971, another suit was instituted in the State courts. This one involved a claim by SAICI that the funds involved in the other State court suit belong to SAICI and that the Bosurgi brothers were holding those funds in trust for SAICI's benefit. That suit was ultimately consolidated with the Bosurgis' action against Chemical Bank.[2/] On December 12, 1973, the State court found that the Bosurgis held the assets in the Chemical Bank account as trustees for SAICI and that SAICI was entitled to the $215,000 settlement. It further ordered that the $215,000 was subject to a "retaining lien" in favor of Ginsberg for his services as an attorney. The Court set the amount of Ginsberg's fees at $68,080.37 plus 35% of all accrued interest to the date of payment plus his unreimbursed disbursements of $994.05.

Three issues are raised by the summary judgment motions:

1) Does the State court ruling that the Bosurgis held the funds in Chemical Bank as trustees for SAICI bind this Court?

2) If not, did the Bosurgis hold the funds as trustees for SAICI?

3) Is the fee awarded to Ginsberg appropriate and should he be allowed to collect it now?

I. BINDING EFFECT OF STATE COURT JUDGMENT

Although the United States was fully aware of the State court proceedings and informally participated therein, it was not a formal party therein.[3] In somewhat similar circumstances the United States Supreme Court has indicated that "when the application of a federal statute is involved, the decision of a State trial court as to an underlying issue of State law should . . . not be controlling." Commissioner v. Estate of Boasch, 387 U.S. 456, 465 (1967). The Court held that in such circumstances a federal court should give "proper regard" to the rulings of the State court. It concluded that such an approach "would be fair to the taxpayer and protect the federal revenue as well." 387 U.S. at 465.[4]

In determining the proper regard to be given the State court proceedings in this particular case, I note that the judgment entered was not a default judgment, but rather was entered on the basis of a motion for summary judgment.

Furthermore, I do not believe that the State court proceedings were in any way collusive as has been suggested by the United States. In making this suggestion, the United States relies principally on the fact that SAICI did not commence its State court action until it appeared that the Bosurgis' $215,000 recovery from Chemical Bank might be subject to federal estate tax liability. I find this argument unpersuasive. There was no reason for SAICI to be concerned about these proceedings until such tax liability was asserted. Up to that point the Bosurgis had adequately represented SAICI's interest. Not until this action was instituted was it important for SAICI to establish that it was the owner of this fund.

The government also argues that the failure of the Bosurgis to appear in this action demonstrates collusion. I fail to see why. Since the Bosurgis were suddenly faced with the assertion of a substantial federal tax liability ($650,000 plus), they may well have wanted to avoid further connection with this litigation and thus leave it to SAICI to vindicate its interest.

If the government seriously desires to suggest collusion, it must produce some evidence to that effect. Flitcroft v. Commissioner, 328 F.2d 449, 454 (9th Cir. 1964). It has failed to do so here. Indeed, in discussing the

factors to be considered in determining whether there was collusion in the State court proceedings involved in Flitcroft, two of the factors listed by the Ninth Circuit were "whether the federal tax authorities have notice of the State court action" and whether the State court reached the correct result." 328 F.2d at 455. I will discuss the latter issue in part II, but as to the question of notice, the United States certainly had notice of the State court proceedings in this case; the parties in the State court seemed anxious to have the government join in that proceeding. I conclude that the State court proceedings were not collusive.5/

Thus, there is no reason not to give proper regard to the State court proceedings herein. Indeed, since such interests as judicial economy are enhanced by allowing competent State tribunals to decide issues of State law, see Klein v. Walston Co., 432 F.2d 936, 937 (2d Cir. 1970), I think that it is proper here to give considerable weight to the fact that the State court has found that SAICI is the owner of the funds in the Chemical Bank account. See Miglionico v. United States, 323 F.Supp. 197 (N.D.Ala. 1971).6/

II. WAS SAICI THE REAL OWNER OF THE BOSURGIS' ACCOUNT AT CHEMICAL BANK

The State court found that the money on deposit with Chemical Bank was held by the Bosurgis for the benefit of SAICI. That decision was based on documentary evidence submitted by SAICI on its motion for summary judgment. Ginsberg, on behalf of the Bosurgis, admitted that the documents were genuine. They consisted of a trust instrument signed in 1954, which indicated that the Bosurgis were to maintain an account in New York for the benefit of SAICI and various pieces of correspondence dated between 1955 and 1962, from the Bosurgis to SAICI in which the Bosurgis acknowledged that the New York account was held for SAICI's benefit.7/

As counter evidence the United States offers uncontested documentary evidence as follows:

First, that there was no indication given to Chemical Bank that the account was other than a personal account.

Second, that the income taxes paid on dividends paid into the account were paid by Mrs. Bosurgi.8/

Third, that the income taxes on the account should have been paid at a rate of 30%, rather than the 15% actually paid, if SAICI was the owner of the account.9/

Fourth, that the financial statements of SAICI, filed with the Uruguayan government, do not list the trust account as an asset.

These four factors do not deny the existence of a trust agreement in any way. At best they establish that SAICI may be a secretive organization (the trust agreement recites that the persons behind SAICI desired to keep secret their participation in financing a joint venture with the Bosurgis) and that there may be some liability to the United States (and perhaps Uruguay) for income taxes.

In looking at the evidence before the State court, the United States notes that the fact that the Bosurgi account was opened some months before the trust agreement was purportedly signed is evidence that there was no such agreement. However, the trust agreement recites that it is a confirmation of an earlier oral agreement.

While the government quibbles about the authenticity of the evidence before the State court, five members of the Appellate Division of the New York Supreme Court found it sufficient to order the State trial court to enter summary judgment on SAICI's behalf. I have already indicated that I feel that considerable regard should be given to the decisions of the State court in this case. Since the government fails to offer any convincing evidence that controverts

the existence of a trust, SAICI's motion for summary judgment should be granted.

III. ATTORNEYS' FEES

Since the Chemical Bank account was the property of SAICI,[10] it is not subject to any federal estate tax liability. Thus this Court has no further interest in this suit. The possibility of estate tax liability having been eliminated, there is no basis for continuing the order requiring Ginsberg to hold the $215,000 in escrow. The dispute between Chemical and Ginsberg as to when the State court stipulation permits payment of Ginsberg's fees is a matter for determination in the State courts.

1. SAICI's motion for summary judgment is granted and the complaint against it is dismissed.

2. The United States' motion for summary judgment is denied.

3. Ginsberg's motion for summary judgment is granted in so far as the complaint against Ginsberg is dismissed.

4. Chemical Bank's motion for summary judgment is granted and the complaint against Chemical Bank is dismissed.

5. The order of this Court dated March 18, 1971, setting up the escrow account in this matter, is vacated.

6. The default judgment against the Bosurgis (in rem) is vacated.11/

SO ORDERED.

U. S. D. J.

Dated: New York, New York
February 25, 1975.

FOOTNOTES

1/ Although the United States has not withdrawn its motion for summary judgment, it has submitted an affidavit suggesting that there is a genuine issue of material fact involved herein that requires a trial. Specifically, it suggests that the State court proceedings discussed herein may have been collusive against the interests of the United States.

2/ The Supreme Court initially refused to consolidate the cases, but it was later ordered to do so by the Appellate Division. 43 App. Div.2d 519, 344, N.Y.S.2d 75.

3/ I am not unmindful of the fact that the United States Attorney was represented at a conference held before the State Court Justice and that the United States addressed letters to the State court indicating its view of the proceedings. However, I am not persuaded that the United States had such a "laboring oar in the controversy" so as to consider it a formal party. See Drummond v. United States, 324 U.S. 316, 318 (1945).

4/ See Cheng Yih-Chun v. Federal Reserve Bank of N.Y., 442 F.2d 460, 463 (2d Cir. 1971).

5/ The extent to which the United States is grasping at straws in order to avoid the consequences of its refusal to walk across the street to the New York County Courthouse is seen in its allegation that collusion is indicated by the failure of SAICI and Ginsberg to serve the record and their briefs on the United States when they appealed in the State court proceeding. In making this argument, the government fails to admit that it had received their notices of appeal and that it attempted to file a letter-brief with the Appellate Division.

6/ In its argument that this Court should ignore the State court proceedings, the government suggests that the State court could not act because of this Court's order of March 18, 1971. I disagree. That order simply directed Ginsberg to hold the fund in escrow until further order of this Court. The order in no way indicated that the then pending State court proceedings should be stayed. The New York courts could and did determine which of the parties before it was the owner of the account at Chemical Bank. The United States is not bound by that decision in this proceeding, but I will give proper regard to the State court decision pursuant to Bosch.

7/ The United States suggests that these facts cannot be considered because they are not within the personal knowledge of SAICI's attorney, who filed the only affidavit in this Court in support of SAICI's motion for summary judgment. See Fed. R. Civ. P. 56(e). I find it sufficient that these facts are in the record of the State court proceedings which is before this Court.

8/ The government does not offer any tax returns filed by Mrs. Bosurgi, but rather submits Chemical Bank's Form 1042S Return showing the name of the owner of the account, its income and the tax withheld.

9/ The difference is attributable to the existence of a tax treaty with Italy, but not with Uruguay.

10/ The trust documents before the State court indicate that the entire account was the property of SAICI and the State court so held.

11/ This disposition moots the issue of whether discovery should go forward.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-v-

LEONE BOSURGI AND EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI AND EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND BENEDICT GINSBERG,

Defendants-Appellees

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, AND W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader of Chemical Bank

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND W. SANDERSON & SONS,

Third-Party Defendants.

NOTICE OF APPEAL

71 Civ. 928 (KTD)

S I R S :

PLEASE TAKE NOTICE that the plaintiff, United

States of America, appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York (Honorable Kevin Thomas Duffy) dated February 25, 1975 and filed with the District Court on February 25, 1975.

Dated: New York, New York

April 21, 1975.

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

By: David P. Land

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Chemical Bank New York Trust Co.

U.S. DISTRICT COURT
FILED
JUN 4 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- LEONE BOSURGI, et al., Defendants.	71 Civ. 928 (KTD) ORDER & Judgment

Defendants Sociedad Anonima de Inversiones Commerciales e Industriales ("SAICI"), Benedict Ginsberg and Chemical Bank New York Trust Company ("Chemical") each having moved to dismiss the complaint of plaintiff, the United States of America ("United States"); and Benedict Ginsberg having further moved for permission to distribute a fund currently held by him in escrow pursuant to an order of this Court dated March 18, 1971, and a stipulation entered into by Mr. Ginsberg on September 15, 1970; and the Court having filed its opinion and order on February 25, 1975, granting said motions, finally disposing of all claims of the United States, vacating the March 18, 1971, order, but leaving unresolved certain cross-claims and third-party claims of defendant Chemical, it is

ORDERED that the aforesaid February 25, 1975, order is amended as follows:

A. The complaint of the United States is dismissed against defendants SAICI, Benedict Ginsberg and Chemical on the merits with prejudice; and the Court

determines that:

(1) all claims of the United States have been resolved by this Court's aforesaid order;

(2) the claims of the United States are tax claims arising out of transactions and circumstances that took place more than 12 years ago, and any further delay in the final resolution of these claims may cause substantial prejudice to all parties;

(3) an appeal by the United States at this time will cause no prejudice to any party and will contribute to a speedy resolution of Chemical's remaining claims;

(4) Chemical's remaining claims which are claims for indemnity and claims for litigation expenses would be severable from this action, and Chemical's indemnity claims may well be rendered academic by an early appellate ruling on the tax claims of the United States;

(5) trial of Chemical's remaining claims at this time may substantially delay the appeal of the United States and this delay will substantially increase the likelihood of witnesses and other evidence becoming unavailable if a reversal of this Court's order eventually makes a trial of the tax claims necessary; and

(6) an appeal by the United States at this time which results in an affirmance of this Court's order will avoid encumbering both the parties and the Court with the unnecessary burden of trying Chemical's indemnity claims.

B. There being no just reason for delay in the

entry of judgment pursuant to Fed. R. Civ. P. 54(b) in favor of said defendants dismissing the complaint of the United States, the Clerk is directed to enter judgment dismissing on the merits and with prejudice the claims and complaint of the United States, and severing the action accordingly.

C. Benedict Ginsberg will continue to hold the fund in escrow pursuant to the provisions of the March 18, 1971, order, to wit:

> "That the said Benedict Ginsberg, Esq. have and hold the said certificates of deposit in escrow subject to and impressed with any and all liens of the United States of America, and subject to any further order of this Court which may be made with regard to the rights of the United States of America, and any other claimant to the said $215,000."

pending final resolution (including appeals) of all tax claims in this action.

Dated: April 22, 1975,
At New York, N.Y.

JUN 3-1975

United States District Judge

JUDGMENT ENTERED - 6/4/75

Approved by Duesenberg
Clerk

DPL:lm
71-0577

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

-v-

LEONE BOSURGI AND EMILIO BOSURGI, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, CHEMICAL BANK, AS STATUTORY EXECUTOR OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, LEONE BOSURGI AND EMILIO BOSURGI, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND BENEDICT GINSBERG,

Defendants-Appellees,

-and-

ESTATE OF ADRIANA BOSURGI, DECEASED, AND W. SANDERSON & SONS,

Additional Defendants to Amended Counterclaim and Amended Cross-Claim for Interpleader of Chemical Bank

-and-

CHEMICAL BANK,

Third-Party Plaintiff,

-against-

LEONE BOSURGI AND EMILIO BOSURGI, INDIVIDUALLY, AS EXECUTORS OF THE ESTATE OF ADRIANA BOSURGI, DECEASED, AS TRUSTEES OF A TRUST FOR THE BENEFIT OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AS AGENTS OF SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES AND AS AGENTS OF W. SANDERSON & SONS, ESTATE OF ADRIANA BOSURGI, DECEASED, SOCIEDAD ANONIMA DE INVERSIONS COMMERCIALES E INDUSTRIALES, AND W. SANDERSON & SONS,

Third-Party Defendants.

NOTICE OF APPEAL

71 Civ. 978 (RTD)

S I R S :

PLEASE TAKE NOTICE that the plaintiff, United

DPL:lm
71-0512

States of America, appeals to the United States Court of Appeals for the Second Circuit from the order and judgment of the United States District Court for the Southern District of New York (Honorable Kevin Thomas Duffy) dated April 22, 1975 and filed with the District Court on June 4, 1975.

Dated: New York, New York

June 18, 1975

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

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